

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Application by Qwest Communications)	
International, Inc., for Authorization to)	WC Docket No. 03-11
Provide In-Region, InterLATA Services)	
In New Mexico, Oregon and South Dakota)	

February 5, 2003

**COMMENTS OF THE
NEW MEXICO PUBLIC REGULATION COMMISSION**

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Appendix – Transcript of Track A Proceedings before the New Mexico Public Regulation Commission on January 22-23, 2002, with Exhibit Volumes I & II (public version), *In the Matter of Qwest Corporation’s Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Utility Case No. 3269.

I. INTRODUCTION AND EXECUTIVE SUMMARY

The New Mexico Public Regulation Commission (“NMPRC”) recommends that the Federal Communications Commission (the “Commission”) grant the application of Qwest Communications International, Inc. (“Qwest”) for authority under section 271 of the Communications Act, as amended,¹ to provide in-region, interLATA services in the State of New Mexico, provided however, as explained more fully below, that the Commission satisfy itself that Qwest is in compliance with the requirements of 47 U.S.C. § 271(c)(1)(A), the so-called “Track A” requirements.

The NMPRC’s comments in this docket represent the culmination of a three-year process devoted to evaluating pursuant to 47 U.S.C. § 271(d)(2)(B) whether and to what extent Qwest has meaningfully and permanently opened its local network for use by competitors and would-be competitors in the local exchange market in New Mexico. The extensive record developed by the NMPRC in its section 271 proceedings, which Qwest has filed with its application, should afford the Commission considerable information and assistance in determining whether Qwest has satisfied the requirements of section 271 of the Act such that it should be granted the authority to enter the in-region, interLATA market in the State of New Mexico.

The adjudicative and collaborative processes that comprised the NMPRC’s section 271 proceedings are summarized in Section II of these comments. As described in Section II, the NMPRC evaluated Qwest’s compliance with the requirements of section 271 in part through a series of distinct multi-state collaborative processes. In each instance in which it participated in a collaborative process, the NMPRC independently evaluated the findings and recommendations of each collaborative and entered interim orders detailing the NMPRC’s findings, conclusions and

¹ The Communications Act of 1934, as amended, by the Telecommunications Act of 1996 – Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.* – is referred to hereafter as the “Act.”

recommendations. The NMPRC also held state-specific adjudicatory proceedings that included the submission of briefs, oral argument, and in some instances, evidentiary proceedings. Consistent with its independent evaluation of the results of the collaborative processes, at the close of each of the New Mexico-specific proceedings, the NMPRC entered a discrete interim order containing comprehensive findings, conclusions and recommendations. All told, the NMPRC issued well over 50 orders in its section 271 proceedings, including at least a dozen orders on rehearing after one or more of the parties sought reconsideration of an interim order in whole or in part.

Section III summarizes the NMPRC's findings and conclusions with respect to Qwest's compliance with the requirements of Track A. Through the Multi-State Proceeding and the New Mexico-specific evidentiary proceedings conducted by the NMPRC, as set forth in the *Final Order* in its section 271 proceedings,² the NMPRC found Qwest has satisfied most of the requirements of Track A. However, as addressed below, after holding two rounds of evidentiary proceedings between November 2001 and June 2002 and conducting a formal Track A CLEC survey, the NMPRC could not find sufficient, credible evidence in the record to support a conclusion that more than a *de minimis* number of facilities-based competitors are providing service to residential customers in Qwest's service area in the State of New Mexico. Given the issues of first impression implicated in applying the Commission's *de minimis* standard to Qwest's Track A application for New Mexico, which as Qwest's Brief confirms is founded entirely on 100% residential resale competition and/or residential PCS-for-wireline substitution,³ and given the NMPRC's consultative

² *Final Order Regarding Compliance with Outstanding Section 271 Requirements: SGAT Compliance, Track A, and Public Interest*, Utility Case Nos. 3269 & 3537, 3495 and 3750 (Oct. 8, 2002) (*Final Order*) (Qwest Application, NM App. C, Vol. 1, Tab 19).

³ See Brief of Qwest Communications International, Inc. in Support of Consolidated Application for Authority to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota, WC Docket No. 03-11 (Jan. 15, 2003) ("Qwest's Brief"), at 12-20.

role under the Act, the NMPRC elected to present the findings and conclusions of the Track A evidentiary proceeding without rendering a dispositive recommendation regarding Qwest's satisfaction of the Track A test.

Section IV addresses the NMPRC's findings that Qwest has satisfied the 14-point competitive checklist set forth in 47 U.S.C. § 271(c)(2)(B). Section IV includes a summary of the NMPRC's review of the final report on the third-party OSS testing and Qwest's change management process. Section IV also includes a summary of the NMPRC's findings respecting the reasonableness of Qwest's rates for UNEs and other interconnection offerings in New Mexico for purposes of compliance with section 271 of the Act, which requires that section 271 analyses take into account the Act's wholesale pricing requirements pursuant to 47 U.S.C. §§ 251(c)(2), 251(c)(3), and 252(d)(1).⁴

Section V addresses the NMPRC's findings regarding the requirements of section 272 of the Act.⁵ As set forth more fully below, in its *Final Order*, the NMPRC vacated its earlier determination that Qwest was in compliance with section 272's requirements, particularly the NMPRC's earlier findings and conclusions respecting sections 272(b)(2) and 272(b)(5),⁶ given the NMPRC's conclusion that the record of its proceedings had been rendered inaccurate given the withdrawal by Qwest of its first two section 271 applications on September 10, 2002.⁷ However, finding that the matter was a region-wide issue for which a state-specific review would be inefficient and a waste of administrative resources, the NMPRC denied the motion to reopen submitted by

⁴ See 47 U.S.C. §§ 271(c)(2)(B)(i) (interconnection) and 271(c)(2)(B)(ii) (UNEs).

⁵ 47 U.S.C. § 272. See 47 U.S.C. § 271(d)(3)(B).

⁶ 47 U.S.C. §§ 272(b)(2) & (b)(5).

⁷ See Qwest's Letter Report Regarding FCC 271 Application, containing Sept. 17, 2002 letter to the NMPRC from Steve Davis, at 1-2 (Qwest Application, NM App. K, Vol. 1, Tab 1493).

AT&T Communications of the Mountain States, Inc. (“AT&T”) and referred to the Commission for its evaluation the matter of Qwest’s compliance with the requirements of section 272.

Section VI summarizes the NMPRC’s findings and conclusions regarding whether Qwest’s entry into the in-region, interLATA market in the state of New Mexico would be “consistent with the public interest, convenience, necessity” pursuant to 47 U.S.C. § 271(d)(3)(C). As discussed below, the NMPRC recommends that the Commission find that Qwest’s application for in-region, interLATA service in the state of New Mexico is in the public interest and that the Commission should grant Qwest its requested long distance entry assuming the Commission finds and concludes all other applicable requirements have been satisfied.

Section VII addresses Qwest’s New Mexico Statement of Generally Available Terms and Conditions (the “SGAT”). On November 22, 2000, Qwest filed with the NMPRC an application to open an SGAT case pursuant to section 252(f) of the Act. The NMPRC thereupon promptly opened an SGAT docket, Utility Case No. 3537.⁸ From its earliest interim order in Utility Case No. 3269, the NMPRC expressly conditioned its findings and conclusions of compliance with the 14-point competitive checklist and other pertinent requirements on Qwest filing an SGAT that conformed in all material respects to the NMPRC’s orders in the section 271-related proceedings.⁹ As the section 271 proceedings progressed, it became increasingly clear to the NMPRC that the companion dockets essentially had become united in the primary objective of determining Qwest’s

⁸ *In the Matter of Qwest Corporation’s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996.*

⁹ *Order on Checklist Items 3, 7, 8, 9, 10, and 12 (Paper Workshop Order)* (July 31, 2001) (Qwest Application, NM App. C, Vol. 1, Tab 2), at 7-10.

compliance with the requirements of section 271. Thus, on May 21, 2002, the NMPRC consolidated Utility Case No. 3537 with its section 271 docket, Utility Case No. 3269.¹⁰

Therefore, consistent with the following comments, assuming the Commission finds that Qwest has satisfied the requirements of Track A, the NMPRC recommends that the Commission authorize Qwest's entry into the in-region, interLATA market in the State of New Mexico.

II. PROCEDURAL HISTORY BEFORE THE NMPRC

Created by constitutional amendment and structured by statute, the NMPRC came into existence on January 1, 1999, combining the functions of the former Public Utility Commission and State Corporation Commission. The NMPRC is composed of five commissioners elected from geographical districts to staggered four-year terms. The NMPRC has the authority to regulate in the public interest the rates, services, facilities and practices of telecommunications companies operating in the State of New Mexico as well as to promote competition in the provision of telecommunications services in the state. Consistent with the Commission's urging that states conduct "an exhaustive and rigorous investigation into the BOC's compliance with the checklist,"¹¹ with the issuance of its *Final Order* on October 8, 2002 the NMPRC completed its two and one-half year adjudicative processes dedicated to verifying Qwest's compliance with the requirements of section 271 of the Act.

The NMPRC's section 271 proceedings were initiated by U S WEST Communications, Inc. in February 2000, prior to U S WEST's merger with Qwest.¹² The NMPRC considered the various

¹⁰ *Order Consolidating Cases* (Qwest Application, NM App. K, Vol. 1, Tab. 1202).

¹¹ *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶ 51 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

¹² *See* U S WEST Communications' Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process, Utility Case No. 3269 (Feb. 8, 2000) (Qwest Application, NM App. K, Vol. 1, Tab 1).

aspects of Qwest's compliance with the requirements of section 271 through a combination of multi-state collaboratives and state-specific proceedings. The NMPRC initially addressed Qwest's compliance with the requirements of section 271 through two distinct multi-state collaboratives, *i.e.* the Multi-State Proceeding and the ROC OSS test.

A. The Collaboratives: The Multi-State Proceeding and the ROC OSS Test

In the Multi-State Proceeding, the NMPRC joined with the commissions for the states of Idaho, Iowa, Montana, North Dakota, Utah and Wyoming to review Qwest's compliance with the 14-point competitive checklist and other section 271 requirements. The participants in the Multi-State Proceeding, *i.e.*, Qwest, certain CLECs, state commission staffs and other state representatives, addressed checklist compliance, associated SGAT development, and the other section 271 requirements through written testimony, comments and briefs, as well as, in most instances, a series of in-person "Workshop" proceedings conducted by John Antonuk of the Liberty Consulting Group ("Liberty"), the "Facilitator" retained by the seven states that sponsored the Multi-State Proceeding.

The Facilitator reviewed the issues raised by the participants, identified those issues resolved during the workshop processes as well as the issues remaining in dispute, and recommended resolutions for the disputed issues in a series of reports. The NMPRC considered the Facilitator's reports to be akin to recommended decisions issued by the NMPRC's Hearing Examiners in adjudicative proceedings before the NMPRC. The Facilitator's reports¹³ covered the section 271(c)(2)(B) checklist items, SGAT General Terms and Conditions, section 272, Qwest's

¹³ See generally Qwest Application, Facilitator Appendix C. Additionally, the Facilitator's reports and related documents, including the participants' Multi-State Proceeding briefs, testimony and exhibits, are available at <http://www.libertyconsultinggroup.com/six.htm>.

Performance Assurance Plan (“QPAP”),¹⁴ Track A, and the public interest analysis pursuant to section 271(d)(3)(C).¹⁵

Running on a separate but roughly parallel track to the Multi-State Proceeding was the testing and evaluation of Qwest’s operational support systems (“OSS”), which was conducted on a regional basis under the auspices of the Qwest Regional Oversight Committee (“ROC”).¹⁶ The ROC OSS test administrator, KPMG Consulting (“KPMG”), issued the Qwest Communications OSS Evaluation, Final Report, Version 2.0 (*ROC Final Report*) on May 29, 2002.¹⁷

B. New Mexico-Specific Proceedings

Subsequent to the issuance of the Facilitator’s reports and the *ROC Final Report*, the NMPRC conducted New Mexico-specific proceedings that included, *inter alia*, the submission of briefs, oral arguments, and, in certain instances addressed in the succeeding sections of these comments, additional state-specific evidentiary or quasi-evidentiary proceedings.¹⁸ From these proceedings, the NMPRC entered interim orders as well as orders on rehearing concerning, among

¹⁴ The genesis of the QPAP was in yet another multi-state collaborative, the post-entry performance plan (PEPP) collaborative. After the PEPP process ended without Qwest and CLECs having achieved a consensus plan, the Facilitator was retained by the seven states participating in the Multi-State Proceeding to conduct the QPAP proceedings and issue recommendations respecting the content and sufficiency of the QPAP. The Nebraska and Washington commissions joined the original seven states participating in the Multi-State Proceeding for the purpose of addressing the public interest aspects of the QPAP.

¹⁵ 47 U.S.C. § 271(d)(3)(C).

¹⁶ The ROC is composed of representatives of the state regulatory commissions in which Qwest is authorized to provide local exchange service. For purposes of OSS testing, the ROC was composed of 13 of the 14 states in Qwest’s territory, with only Arizona electing to conduct separate testing of Qwest’s OSS in that state.

¹⁷ See generally Qwest Application, Att. 5, App. F, Tabs 3-4. In addition, a copy of the *ROC Final Report* is contained in Exhibit Vol. 1 (Batch 1 of 2) to the transcript of the NMPRC’s July 1-2, 2002 hearings in Utility Case Nos. 3269 and 3537 as Exhibit 3 (Qwest Application, NM App. K, Vol. 1, Tab 1330). Furthermore, a comprehensive set of documents produced during the ROC OSS test have been deposited in the ROC OSS Test Repository web site maintained by NRRI at <http://www.nrri.ohio-state.edu/oss/oss.htm>. Finally, the *Final OSS Report* is available electronically at http://www.nrri.ohio-state.edu/oss/master/kpmg_final-final/final-final_report.htm.

¹⁸ That is, Track A (addressed in Section III below); the “OSS-Related Matters” (namely the (i) the *ROC Final Report*, (ii) the ROC vendor Liberty Consulting Group’s reconciliation of Qwest’s performance data; (iii) Qwest’s actual commercial performance, and (iv) the redesign of Qwest’s Change Management Process) (Section IV *infra*); the determination of reasonable and appropriate interim rates for interconnection and access to UNEs (also in Section IV

other relevant issues addressed below, the section 271(c)(2)(B) checklist items,¹⁹ General Terms and Conditions,²⁰ section 272,²¹ Qwest's performance assurance plan (the "QPAP"),²² and the approval of interim rates for interconnection and access to UNEs.²³ The NMPRC entered its *Order on OSS-Related Matters (OSS Order)* on September 3, 2002.²⁴ Lastly, the NMPRC issued its *Final Order* regarding the outstanding compliance issues on October 8, 2002.²⁵

AT&T and Qwest filed motions for rehearing concerning certain findings in the *Final Order*. AT&T argued that Qwest's entry into the in-region, interLATA market would not be in the public interest given that the preponderance of the evidence allegedly shows that Qwest's actions in negotiating and concealing the unfiled agreements, and extracting promises for bargained-for consideration from two CLECs to not oppose Qwest's section 271 application, is in violation of the

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infra); consideration of the price squeeze issue, Qwest's proposed local service freeze offering, and the NMPRC'S unfiled agreements investigation (referenced in Section VI *infra*).

¹⁹ See *Paper Workshop Order* (Qwest Application, NM App. C, Vol. 1, Tab 2); *Order on Checklist Items 1, 11, 13 and 14 (Group 2 Order)* (Sept. 18, 2001) (Qwest Application, NM App. C, Vol. 1, Tab 3); *Order on Emerging Services* (Oct. 16, 2001) (Qwest Application, NM App. C, Vol. 1, Tab 4); *Order Regarding Facilitator's Report On Checklist Item 2 (Access To Unbundled Network Elements), Checklist Item 4 (Access To Unbundled Loops), Checklist Item 5 (Access To Unbundled Local Transport) And Checklist Item 6 (Access To Unbundled Local Switching) (Group 4 Order)* (Nov. 20, 2001) (Qwest Application, NM App. C, Vol. 1, Tab 5); *Order on Rehearing Portions of Group 2 Order* (Jan. 22, 2002) (Qwest Application, NM App. C, Vol. 1, Tab 7); *Order on Rehearing Aspects of Emerging Services Order* (Apr. 2, 2002) (Qwest Application, NM App. C, Vol. 1, Tab 11); *Order on Rehearing Concerning Proportional Pricing System for Entrance Facilities* (May 7, 2002) (Qwest Application, NM App. C, Vol. 1, Tab 12); *Order Regarding Inter-carrier Compensation for ISP-Bound Traffic* (May 21, 2002) (Qwest Application, NM App. C, Vol. 1, Tab 13); *Order on Rehearing of Aspects of Group 4 Order and Qwest's Demonstration of Compliance Regarding Access to Unbundled Loops* (July 9, 2002) (Qwest Application, NM App. C, Vol. 1, Tab 14). Copies of these and other orders entered in these proceedings also are available at <http://www.nmprc.state.nm.us/qwestsect271.htm>.

²⁰ *Order Regarding SGAT General Terms and Conditions* (Dec. 18, 2001) (Qwest Application, NM App. C, Vol. 1, Tab 6); *Supplemental Order Regarding General Terms and Conditions* (Apr. 2, 2002) (Qwest Application, NM App. C, Vol. 1, Tab 10).

²¹ *Order Regarding Section 272 Compliance* (Feb. 12, 2002) (Qwest Application, NM App. C, Vol. 1, Tab 8); *Order Denying Motion for Rehearing* (May 21, 2002) (Qwest Application, NM App. K, Vol. 1, Tab 1202).

²² *Order Regarding Qwest's Performance Assurance Plan (QPAP Order)* (May 29, 2002) (Qwest Application, NM App. C, Vol. 1, Tab 14); *Order on Rehearing Concerning Aspects of QPAP Order* (Aug. 13, 2002) (*QPAP Rehearing Order*) (Qwest Application, NM App. C, Vol. 1, Tab 16).

²³ *Final Order for Phase A*, Utility Case No. 3495 (Aug. 27, 2002) (*Phase A Order*) (Qwest Application, NM App. C, Vol. 2, Tab 6).

²⁴ Qwest Application, NM App. C, Vol. 1, Tab 18.

very law under which Qwest seeks long distance authority.²⁶ AT&T also contended the existence of the secret interconnection agreements demonstrates that Qwest is not checklist compliant, and that approval of its section 271 application at this time is improper.²⁷ Inasmuch as AT&T's arguments raised nothing demonstrably new or not otherwise addressed in the *Final Order*,²⁸ the NMPRC denied AT&T's motion by operation of law, *i.e.*, pursuant to 17 NMAC 1.2.39.F(4)²⁹ of its Utility Division procedural rules, which provides if the NMPRC does not act on a motion for rehearing within 20 days of filing the motion is deemed denied.

Unlike AT&T's motion, Qwest's motion does not challenge the NMPRC's decision in the *Final Order* either on the merits concerning the matter of the unfiled agreements' impact of the public interest analysis pursuant to section 271(d)(3)(C) or on the merits of any of the NMPRC's other findings and conclusions therein. Instead, Qwest has asked the NMPRC to reconsider two isolated aspects of its determination of the categories of agreements that are subject to filing pursuant to section 252 of the Act: (i) "backward-looking" settlement agreements and (ii) "extraterritorial" interconnection agreements that purportedly do not relate to services provided in New Mexico.³⁰ Qwest also requested that the NMPRC stay the two portions of the *Final Order* it is challenging pending consideration of its motion for rehearing because these issues were not fully

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²⁵ Qwest Application, NM App. C, Vol. 1, Tab 19.

²⁶ AT&T's Motion for Rehearing (Nov. 5, 2002) (Qwest Application, NM App. K, Vol. 1, Tab 1526).

²⁷ *Id.*

²⁸ See findings and conclusions set forth in the *Final Order* regarding the unfiled agreements investigation in Utility Case No. 3750, *In the Matter of an Investigation into Unfiled Agreements Between Qwest Corporation and Competitive Local Exchange Carriers* (Qwest Application, NM App. K, Vol. 1, Tab 19), at 112-146.

²⁹ "17 NMAC 1.2.39.F(4)" refers to Title 17 of the New Mexico Administrative Code, Chapter 1, Part 2, Subpart 39, section F(4).

³⁰ Qwest's Motion for Rehearing of the Final Order Limited to the Requirements to File Historical Settlement Agreements and Extraterritorial Agreements and Motion for Stay of Those Requirements (Nov. 7, 2002) (Qwest Application, NM App. K, Vol. 1, Tab 1527) (collectively, "Qwest's motions").

briefed before the NMPRC previously, particularly because on October 4, 2002, the Commission rendered its decision regarding Qwest's petition for declaratory ruling in WC Docket No. 02-89,³¹ a mere four days before the NMPRC's *Final Order* was issued. As a consequence, the questions surrounding the challenged portions of the *Final Order* may not have been fully vetted in the proceedings before the NMPRC.³² On November 19, 2002, AT&T filed a response objecting to Qwest's motions for rehearing and stay. Thereafter, on November 20, 2002, the NMPRC issued an order finding good cause to grant an extension of time for any other interested party to respond to Qwest's motion for rehearing.³³ However, the NMPRC found insufficient cause to grant Qwest its requested stay.³⁴ The NMPRC currently has under advisement the matter of whether to deny or grant, in whole or in part, Qwest's motion for rehearing.

III. TRACK A REQUIREMENTS

A. Background and Procedural History

1. In the *Group 5 Report*,³⁵ the Facilitator found that Qwest had not satisfied the requirements of Track A as the requirements apply to the states of Idaho and New Mexico "for reason of its failure to provide substantial evidence that competitors are serving residential end users." This finding spawned a virtual case of its own within Utility Case No. 3269, a case that required two separate evidentiary proceedings between November and June 2002 and other

³¹ *In the Matter of Qwest Communications International, Inc.'s Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order (rel. Oct. 4, 2002).

³² Qwest's motions (Qwest Application, NM App. K, Vol. 1, Tab 1527).

³³ NMPRC Order Granting Additional Time to Respond and Denying Motion for Stay (Nov. 20, 2002), at 2. On December 3, 2002, the Telecommunications Bureau of the NMPRC's Utility Division ("Staff"), which by state statute (NMSA 1978, § 8-8-12(C)) represents the public interest as advocates in proceedings before the NMPRC, filed a response to Qwest's motion for rehearing as did the New Mexico Attorney General ("Attorney General"). In turn, on December 12, 2002, Qwest filed leave to file a reply to the parties' responses.

³⁴ *Id.*

proceedings such as the NMPRC's *Notice of Inquiry* wherein the NMPRC ordered CLECs certificated in the state to file responses to the NMPRC's Track A Local Exchange Survey. In the interests of affording the Commission a better sense of the NMPRC's Track A proceedings, what follows is a condensed version of the background and procedural section of the NMPRC's *Final Order*.³⁶

During the Multi-State Proceeding workshop devoted to Track A, Qwest indicated that it could not obtain the actual numbers for facilities-based competition for the participating states and therefore suggested that "the commissions of the seven states would appreciate seeing the actual numbers for facilities-based competitors in their state."³⁷ Qwest thus suggested that the state commissions perform Track A surveys aimed at receiving this information directly from CLECs.³⁸

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³⁵ Facilitator's Report on Group 5 Issues: General Terms and Conditions, Section 272, and Track A (Sept. 21, 2001) (*Group 5 Report*) (Qwest Application, Facilitator App. C, Vol. 1, Tab 7), at 85.

³⁶ Qwest Application, NM App. C, Vol. 1, Tab 19, at 38-46.

³⁷ Multi-State Proceeding, Confidential Tr. 6/26/01, p. 87.

³⁸ *Id.*

On July 31, 2001 the NMPRC issued a *Notice of Inquiry* instructing local exchange carriers operating in the State of New Mexico to provide responses to its Track A Local Exchange Survey (*Track A Survey*). In the *Notice of Inquiry*, the NMPRC stated:

Because it is vital to the public interest to obtain an accurate accounting of the nature and extent of the provision of facilities-based competitive service to residential and business customers in Qwest's service territory, the Commission instructs all LECs subject to the Commission's jurisdiction...to provide the Commission full, complete and prompt responses to the questions contained in the attached 'Track A Local Exchange Service Survey.'³⁹

In the *Group 5 Report*, the Facilitator concluded that Qwest had established that it has signed one or more binding interconnection agreements and that it is providing access and interconnection to unaffiliated competing providers.⁴⁰ However, for New Mexico, the Facilitator found that Qwest had not established the next two elements of the four-part test established by the FCC in the *Ameritech Michigan Order*. Therefore, according to the Facilitator, Qwest had not established that it satisfies Track A for New Mexico.⁴¹

In conformity with the NMPRC's *Amended Third Procedural Order*,⁴² the Multi-State Proceeding provided for the filing of comments and exceptions to the Facilitator's reports 10 days after they were issued ("10-day comments"), in this case by October 5, 2001. On October 5, 2001, Qwest filed 10-day comments in New Mexico arguing that the Facilitator erred with respect to his Track A conclusions for New Mexico.⁴³ Qwest also filed new evidence as part of its 10-day comments for New Mexico, attaching the Affidavit of John Badal. Among other things, the Badal

³⁹ *Notice of Inquiry*, at 4 (Qwest Application, App. K, Vol. 1, Tab 696).

⁴⁰ *Group 5 Report* (Qwest Application, Facilitator App. C, Vol. 1, Tab 7), at 73-74.

⁴¹ *Id.* at 85.

⁴² Qwest Application, NM App. K, Vol. 1, Tab 655.

⁴³ See Qwest Comments, Exceptions and Brief Regarding the Facilitator's Report on Group 5 Issues (Qwest Application, NM App. K, Vol. 1, Tab 860).

affidavit cited data from a report produced by Intrado, Qwest's outside E911 database administrator ("Intrado Report"), and attached advertising and other materials purporting to demonstrate that broadband PCS service provided by Cricket Communications, a subsidiary of Leap Wireless International ("Cricket"), in Albuquerque and Santa Fe qualifies as a substitute for Qwest wireline service under section 271(c)(1)(A) of the Act. Based on this new evidence and its argument that the Facilitator had ignored Qwest's evidence that resellers of local service are serving a sufficient number of residential subscribers in its New Mexico territory to satisfy the Track A *de minimis* standard, Qwest asked that the NMPRC reject the Facilitator's findings that Qwest had not satisfied the third or fourth parts of the four-part Track A test established by the FCC in the *Ameritech Michigan Order* and find instead that Qwest satisfies the requirements of Track A in New Mexico.

Additionally, on October 5, 2001 Qwest filed "Motions to Compel Responses to Track A Survey and for Leave to Submit Additional Evidence Regarding Residential Local Exchange Competition."⁴⁴ In addition to seeking the NMPC's leave to file the Badal affidavit, this filing recounted the history of the NMPRC's July 31, 2001 *Notice of Inquiry* instructing local exchange carriers to provide responses to its *Track A Survey*. Qwest highlighted the importance of the information requested by the NMPRC's *Track A Survey*, emphasized the NMPRC's determination that the information sought by the survey was vital to the public interest and asked that the NMPRC compel those CLECs that had not responded to provide prompt, full, complete and accurate responses to the *Track A Survey*.

Staff and AT&T filed responses arguing that the Badal affidavit submitted by Qwest with its 10-day comments represented new state-specific evidence submitted for the first time after the close of the aspect of the Multi-State Proceeding devoted to Track A. AT&T argued that the new

evidence should be stricken. Staff argued that Qwest's new evidence must be subjected to an evidentiary review here in New Mexico with adequate procedural opportunities including the opportunity for discovery, responsive testimony and cross-examination.

On November 6, 2001 the NMPRC issued an order compelling CLEC responses to the *Track A Survey* and issued a supplemental protective order regarding the survey in issue.⁴⁵ The NMPRC also issued on that date a procedural order for additional Track A proceedings. The procedural order set a schedule for discovery, testimony and a hearing and appointed an NMPRC hearing examiner to preside over the New Mexico specific Track A component of the section 271 proceedings.⁴⁶ Between November 2001 and January 2002, CLECs filed responses to the *Track A Survey*.

An evidentiary hearing commenced on January 22, 2002 and concluded on January 23, 2002. At the outset of the hearing, the Hearing Examiner denied Qwest's Motion to Withdraw Testimony Regarding E911 Data⁴⁷ and its Motion To Strike Portions Of Filed Rebuttal Testimonies.⁴⁸ The Hearing Examiner noted for the record that Qwest wished to change its testimony by amending it as of the date of filing of its motion to withdraw. However, the Hearing Examiner clarified that the original testimony, as filed, was not being stricken or withdrawn from the record and that it could be used by the other parties and referred to by other witnesses.⁴⁹

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⁴⁴ Qwest Application, NM App. K, Vol. 1, Tab 861.

⁴⁵ Qwest Application, NM App. K, Vol. 1, Tab 914.

⁴⁶ Qwest Application, NM App. K, Vol. 1, Tab 915.

⁴⁷ Qwest Application, NM App. K, Vol. 1, Tab 992.

⁴⁸ Qwest Application, NM App. K, Vol. 1, Tab 1009.

⁴⁹ *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 43 & n.108 (citing Tr. 1/22/02, p. 16, a portion of the hearing transcript that was filed in Utility Case Nos. 3269 & 3537 on Jan. 29, 2002; this transcript does not appear to have been included by Qwest as part of its NM App. K. The NMPRC therefore is submitting attached to these comments as an Appendix the transcript of its January 22-23, 2002 hearing in this matter, together with the public (redacted) versions of the two exhibit volumes for this hearing.

On February 14, 2002, Qwest moved to suspend the post-hearing briefing schedule for Track A in anticipation of its planned request to reopen the Track A proceedings.⁵⁰ On February 26, 2002, the NMPRC granted Qwest's Motion to suspend the post-hearing schedule. On March 4, 2002, Qwest filed its Motion to Reopen Track A Proceedings seeking leave to offer into evidence a market survey and statistical analysis (the "Cricket survey" or "new Cricket evidence") addressing alleged wireline substitution competition in New Mexico by Cricket Communications.⁵¹

The NMPRC reopened the Track A proceedings on its own motion pursuant to NMPRC Utility Division rule 17 NMAC 1.2.39.E(4) for the purpose of considering the new Cricket evidence as well as updated evidence of the nature and extent of resale-based residential competition in New Mexico.⁵² After further discovery and the parties' submission of pre-filed direct and rebuttal testimony, a hearing was convened in this matter before the NMPRC's designated hearing examiner on June 10, 2002, and continuing on June 11, 2002.⁵³ The parties subsequently filed post-hearing briefs that included proposed findings and conclusions.⁵⁴

B. Track A Findings

In the wake of the Facilitator's *Group 5 Report* and the ensuing New Mexico-specific Track A proceedings, there was no dispute that Qwest had satisfied the first two prongs of the Track A test first articulated in the *Ameritech Michigan Order*.⁵⁵ The parties also generally agreed that Qwest

⁵⁰ Qwest Application, NM App. K, Vol. 1, Tab 1058.

⁵¹ *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 44 & n.109.

⁵² *Order on Reopening Track A Proceedings* (Mar.26, 2002) (Qwest Application, NM App. C, Vol. 1, Tab 1104). The NMPRC reopened the proceedings on its own motion on public interest grounds after having found Qwest had not provided a sufficient justification to warrant reopening by a party pursuant to 17 NMAC 1.2.39.E(2). *Id.* at 2-5.

⁵³ *See generally* Qwest Application, NM App. K, Vol. 1, Tabs 1265-1276 (the transcripts of the hearing held June 10-11, 2002, together with the exhibits admitted into evidence therein).

⁵⁴ *See* Qwest NM App. K, Vol. 1, Tabs 1358-1362.

⁵⁵ *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 46. According to the Commission's *Ameritech Michigan Order*, ¶ 70, in order to satisfy the requirements of Track A, a BOC must demonstrate four things: (1) that the BOC has one or more binding interconnection agreements that have been approved under section 252 of the Act;

satisfied the third and fourth prongs of the Track A test insofar as business subscribers were concerned.⁵⁶ However, the NMPRC found that Qwest had not provided, and the NMPRC could not independently find, a citation anywhere in the *Group 5 Report* indicating where the Facilitator affirmatively found that Qwest had met the requirement of establishing the existence of competing providers serving business customers in New Mexico.⁵⁷ The NMPRC further noted the Commission's finding that for Track A purposes, evidence submitted by a CLEC on the actual number of customers it serves is "more reliable than the conclusory statements made by" the BOC applicant because a CLEC is in "a better position to know what customers it serves" than is the BOC.⁵⁸ The NMPRC consequently found based on its review of the *Track A Survey* responses and Staff Exhibit MSR-L that Qwest had satisfied prongs three and four for purposes of competing providers serving more than a *de minimis* number of end-user business customers in New Mexico by the use of their own facilities.⁵⁹

It followed that the only obstacle remaining in Qwest's path toward satisfying the Track A test was substantial and credible proof that at least one competing carrier in New Mexico is pro-

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(2) that the BOC provides access and interconnection to one or more unaffiliated competing providers of telephone exchange service; (3) that these competing providers collectively provide telephone exchange service to residential and business subscribers; and (4) that these competing providers offer telephone exchange service to business and residential customers either exclusively or predominantly over their own telephone service facilities in combination with resale. See *Final Order*, (Qwest Application, NM App. C, Vol. 1, Tab 19), at 35 & n.84.

⁵⁶ *Id.*

⁵⁷ *Id.* at 46-47.

⁵⁸ *Id.* at 47. Quoting *In the Matter of Application of BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, ¶ 47 (rel. Oct. 13, 1998) (*BellSouth Louisiana II Order*).

⁵⁹ *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 47.

viding telephone exchange service to residential customers either exclusively over its own facilities or predominantly over its own facilities in combination with resale.

In its first proffer of New Mexico-specific Track A evidence, Qwest presented at the January 22-23, 2002 hearing the following information through witness John Badal: (i) new E-911 database data showing that facilities-based wireline CLEC telephone number in service counts of 4,796 for residential lines; (ii) the number of new housing permits suggested the number of residences in New Mexico continued to grow while Qwest's residential access line base decreased from 607,907 in December 2000 to 604,898 at the end of July; (iii) a total of 36 CLECs have tariffs on file to provide local exchange service to residential customers; and (iv) Cricket has recently entered the New Mexico market and is "positioning" its PCS service as an alternative to traditional landline service.⁶⁰ Qwest also presented evidence updated since the Multi-State Proceeding, through witness David Teitzel, of resale-based residential competition in New Mexico. Qwest's updated evidence revealed that the number of residential resellers in New Mexico has declined significantly since Mr. Teitzel first testified on this matter in the Multi-State Proceeding.⁶¹

In its second proffer of New Mexico-specific Track A evidence, Qwest presented at the June 10-11, 2002 hearing additional updated numbers, through witness David Teitzel, regarding resale-based residential competition in New Mexico. Qwest's updated numbers indicated that the number of residential resellers in New Mexico had declined further since Mr. Teitzel testified in the first round of New Mexico specific Track A evidence.⁶² Qwest also presented evidence of its Cricket

⁶⁰ *Id.* at 48 & n.122.

⁶¹ *Id.* at 48 & n.123.

⁶² *Id.* at 48 & n. 124. The NMPRC observed in footnote 124 that "on November 16, 2001, Qwest witness Teitzel submitted testimony claiming that as of September 30, 2001, a total of 1,829 resold access lines were in service. Teitzel had claimed in the Multi-State Proceeding that the number of resold access lines was 3064. *See* Tr. 1/22/02, Ex. Vol. I., Qwest Exh. 4, p. 7, l. 4. On April 16, 2002, Qwest witness Teitzel submitted testimony claiming that as of February

survey through witness Keith Frederick, president of Frederick Polls in its second round of New Mexico specific Track A evidence.⁶³

During the NMPRC's second round of hearings Qwest conceded that

- 1) Qwest cannot establish that any unbundled loops are being used to serve residential customers in New Mexico;
- 2) Qwest offered no evidence of land line, facilities-based residential service by competitors in New Mexico; and
- 3) That resale is the "predominant means" for residential competition in New Mexico.⁶⁴

Based on Qwest's admissions in the record, the NMPRC found that unbundled loops are not being used to serve residential end users in New Mexico. The NMPRC further found there is no wireline facilities-based residential service by competing carriers in New Mexico and that resale is the "predominant means" for residential competition in New Mexico.⁶⁵ Therefore, the NMPRC was faced with determining whether Qwest had satisfied the remaining components of the Track A test based on a showing that resellers and/or Cricket PCS constitute competing providers of service to residential customers in New Mexico.⁶⁶

As referenced above, Qwest asserted that its residential access line base in New Mexico dropped from 607,907 in December 2000 to 604,898 at the end of July 2001, even though the total numbers of residences in the state has grown. Qwest attributed the drop in its access line base to customer losses to competitors. To account for these purported competitive losses, Qwest offered

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28, 2002, CLECs were reselling a total of 1259 access lines. *See* Tr. 6/10/02, Exh. Vol. I, Qwest Exh. 6, p. 2, l. 8 (Teitzel Supp. Direct 4/16/02)."

⁶³ *Id.* at 48 & n.125.

⁶⁴ *Id.* at 48-49 & nn. 126-128.

⁶⁵ *Id.* at 49.

⁶⁶ *Id.*

two explanations: significant resale-based competition from as many as nine providers and facilities-based replacement competition in the form of Cricket PCS service. Qwest submitted that either of these types of competition, taken separately, is enough to satisfy its remaining Track A requirements. Qwest's position, and the evidence on which its position was founded, was vigorously contested by the other parties participating in the NMPRC's Track A proceedings.

As a threshold matter, the NMPRC noted that the facts before it required it to address two issues of first impression that the NMPRC recognized could warrant, upon a substantial, credible evidentiary showing by the BOC, a finding of satisfaction of the *de minimis* standard separately or in combination: (i) whether Qwest could satisfy Track A based on evidence of residential resale-based competition, and/or (ii) whether Qwest could satisfy Track A based on evidence of residential facilities-based competition from a broadband PCS carrier. The NMPRC regarded these issues as novel in the sense that while the Commission has indicated that it would not deny an application solely because it relies on 100% residential resale and/or broadband PCS substitution, it has never held that a BOC has satisfied Track A based solely on evidence of resale-based CLECs serving residential customers. Likewise, the Commission has yet to hold that a BOC has satisfied Track A based on a broadband PCS carrier serving residential customers.

1. Residential Resale Competition

As an initial matter, the NMPRC agreed with Qwest's assertion that the Commission has provided that the residential component of Track A can be satisfied entirely via resale if all other requirements of section 271 have been satisfied. In the *BellSouth Louisiana II Order* the Commission noted as follows:

We note, however, that reading the statutory language to require that there must be facilities-based service to both classes of subscribers to meet Track A could produce anomalous results, and there appear to be overriding policy considerations that lead to a contrary

construction of the statutory language. In particular, if all other requirements of section 271 have been satisfied, it does not appear to be consistent with congressional intent to exclude a BOC from the in-region, interLATA market solely because the competitors' service to residential customers is wholly through resale.⁶⁷

The Commission reemphasized this residential resale policy in its *SBC Kansas/Oklahoma Order*.⁶⁸

However, the Commission did not base its Track A conclusion in either the *SBC Kansas/Oklahoma Order* or the *BellSouth Louisiana II Order* on the character or quality of the resale evidence adduced in each case.⁶⁹ Thus, the Commission thus far has gone no further with the residential resale policy than offer guidance on an issue that could be determinative of compliance with Track A in a future case, such as this one. However, even assuming the Commission's residential resale policy is applicable in this case, the NMPRC found that it is far from certain that the residential resale evidence on record satisfies other aspects of the Track A criteria.

The NMPRC found that the estimates of the number of residential lines served by resale-based carriers and the number of resale-based carriers offering residential service in New Mexico varied significantly. Qwest's most recent Customer Record and Information System ("CRIS") data showed eight carriers serving a total of 1259 lines.⁷⁰ According to the NMPRC's *Track A Survey*, the aggregate number of residential access lines self-reported by CLECs was approximately 1380.⁷¹ Of the 1380 resale lines, 1369 are served by a single carrier, Comm South Communications, leaving

⁶⁷ *BellSouth Louisiana II Order*, ¶ 48.

⁶⁸ *In the Matter of the Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Red 6237, ¶ 43 n.101 (rel. Jan. 22, 2001) (*SBC Kansas/Oklahoma Order*).

⁶⁹ *Id.*; *BellSouth Louisiana II Order*, ¶ 48.

⁷⁰ *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 52.

⁷¹ *Id.*

other carriers serving a total of 11 lines.⁷² The evidence also indicated that the actual number of resellers and resold lines is decreasing rapidly.⁷³

In any event, the NMPRC noted that given the Commission's recent section 271 orders, the Commission more than likely would consider approximately 1300 CLEC-served resale lines to be more than *de minimis*.⁷⁴ However, the NMPRC detected two hurdles that must be surmounted before reaching such a conclusion in this case. First, the Commission has never used the *de minimis* standard in conjunction with a Track A showing founded exclusively on resale-based competition. This standard has only been applied to facilities-based competition,⁷⁵ hence, at a minimum, embedded in Qwest's Track A case for New Mexico is an additional issue of first impression. Second, as pointed out by the Attorney General, “the use of the term ‘competing provider[]’ in section 271(c)(1)(A) suggests that there must be an actual commercial alternative to the BOC.”⁷⁶

Assuming, again, that the *de minimis* standard were applicable to a 100% resale residential evidence proffering, the NMPRC found that the resellers cited by Qwest almost universally serve a niche market composed primarily of “high risk” customers who have been disconnected by Qwest for failure to make payments.⁷⁷ The dominant resale carrier in New Mexico, Comm South, provides

⁷² *Id.* at 52 & n.137.

⁷³ *Id.* at 52 & n.139.

⁷⁴ While there was much debate in the NMPRC's proceedings about what should be considered *de minimis*, the NMPRC ignored these arguments and any corresponding conclusions, electing to deal with the more prominent factual issues instead. At best, the *de minimis* standard is enigmatic and will ultimately depend on the Commission's judgment. At the time the NMPRC issued its *Final Order*, the then-existing low watermark stood at only 264 residential lines served by a single facilities-based competitor in Maine. The previous low mark was approximately 690 residential lines served by facilities based CLECs in Vermont. *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 53, n.144.

⁷⁵ *Id.* at 53 & n.143.

⁷⁶ *Id.* at 53-54 & n.145, quoting *Ameritech Michigan Order*, ¶ 75 (which, in turn, was quoting *In the Matter of Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd 8685, ¶ 13 (rel. June 26, 1997) (*SBC Oklahoma Order*)).

⁷⁷ *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 54 & n.146.

only prepaid local service starting at \$42 per month and it does not offer its customers long distance service and that the terms of service offered by Comm South are significantly more onerous and costly than those offered by Qwest.⁷⁸ The remaining residential resale competitors operating in New Mexico offer predominantly prepaid services charging similarly high local rates without long distance calling.⁷⁹ Only Premier Communications Group and Servisense.Com offer post-paid services and long distance calling in New Mexico; between these carriers, Servicesence.Com serves a single residential customer in the state.⁸⁰

Moreover, the evidence before the NMPRC supported the conclusion that Comm South targets those customers who have been disconnected by Qwest for nonpayment.⁸¹ Based on the credible evidence of record, the NMPRC found it reasonable to conclude that Comm South's customers have sought the services of a prepaid provider solely because Qwest denied them service due to problems with their payment or credit histories.⁸² The evidence before the NMPRC thus supports the conclusion that Comm South is not seeking or striving for local exchange customers for whom Qwest is vying, and is not competing with Qwest for these customers in any real sense.⁸³

Although Qwest claimed it serves the same body of customers as Comm South, Qwest offered no credible evidence in support of such a claim. Therefore, the NMPRC found that the evidence of record in its Track A proceedings revealed that the resellers in New Mexico are neither competing

⁷⁸ *Id.* at 54 & nn.147 & 148.

⁷⁹ *Id.* at 54.

⁸⁰ *Id.* at 54 & n.149.

⁸¹ *Id.* at 54 & n.150.

⁸² *Id.* at 54-55 & n.151.

⁸³ *Id.* at 55 & n.152.

with Qwest for the same customers nor providing New Mexicans with an “actual commercial alternative.”⁸⁴

2. Broadband PCS Competition

As it did before the NMPRC, Qwest claims that Cricket qualifies as a facilities-based competitor serving residential customers in Albuquerque and Santa Fe and that “the conservative estimate” yielded from its Cricket survey reveals “8,410 to 9,410 Cricket customers” in these cities “have disconnected all residential wireline service...”⁸⁵ As a threshold matter, consistent with the Commission’s determination in the *BellSouth Louisiana II Order*, the NMPRC assumed for purposes of its *Final Order* that broadband PCS service such as Cricket’s satisfies “the statutory definition of ‘telephone exchange service’ for purposes of Track A, and therefore, may serve as the basis for a qualifying application under Track A.”⁸⁶

In the NMPRC’s first round of Track A hearings, Qwest presented, among other items, advertisements, newspaper articles, and three affidavits from individual Cricket customers allegedly proving that Cricket is expressly, and successfully, designed and marketed as a replacement for a first or additional home landline.⁸⁷ Qwest also cited a survey conducted by International Data Corporation (“IDC”) and an excerpted portion of the FCC’s *Sixth CMRS Report*.⁸⁸

The NMPRC found the evidence proffered by Qwest is, at best, anecdotal and thus not persuasive for purposes of showing a substantial number of Cricket customers in New Mexico are using broadband PCS to replace wireline service. For example, the Cricket advertisements indicated that the PCS carrier is offering a prepaid service that costs \$29.95 per month. Qwest also presented

⁸⁴ *Id.* at 55.

⁸⁵ Qwest’s Brief, at 17.

⁸⁶ *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 55 & n.154.

⁸⁷ *Id.* at 57 & n.159.

how Cricket management would like consumers to perceive its service, but the NMPRC found nothing in this evidence demonstrating that consumers are actually using this service as a replacement to Qwest wireline service.⁸⁹ Moreover, the probative value of the newspaper articles presented by Qwest were discounted because the articles relied on statements from Cricket executives without referring to any studies or surveys of actual customer behavior. Since the people behind the statements were not called as witnesses or made available for cross-examination, the NMPRC found this information had little, if any, probative value in this case.⁹⁰

Moreover, one of the newspaper articles highlighted by Qwest suggests about 7% of Cricket's customers in all of the regions Cricket serves have dropped their wireline home phones altogether; this estimate found its way into the *Sixth CMRS Report*.⁹¹ The NMPRC found that Qwest was unable to extrapolate this estimate to a statistically reliable approximation of end users in New Mexico who have dropped wireline service in favor of Cricket PCS service.⁹² Additionally, the record before the NMPRC indicated Cricket initiated service in New Mexico on or about February 14, 2001. The date of the Albuquerque Journal article is February 22, 2001, or approximately one week after Cricket initiated service in New Mexico. The NMPRC found it implausible to conclude that Cricket had achieved actual replacement of 7% of Qwest's wireline service in New Mexico in the relevant timeframe.⁹³

Further, the NMPRC found that the three affidavits executed by Cricket customers do not prove that people are choosing Cricket in lieu of Qwest wireline service. The affidavits were

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⁸⁸ *Id.* at 57 & nn.160 & 161.

⁸⁹ *Id.* at 58 & n.162.

⁹⁰ *Id.* at 58 & n.163.

⁹¹ *Id.* at 58 & n.164.

⁹² *Id.* at 58.

deemed unreliable inasmuch as the three affiants, apparently all acquaintances of Mr. Badal, were not called as witnesses and were not subject to cross-examination. Moreover, the NMPRC found that the affidavits do not comprise a representative random sampling of Cricket's customer base as required by paragraph 37 of the *BellSouth Louisiana II Order*.⁹⁴

Finally, the probative value of the IDC survey, which purports to show the amount of wireless substitution taking place in the United States, was found wanting because the survey does not distinguish between cellular and PCS substitution. Parties identified this same problem with the *Sixth CMRS Report*. Furthermore, the NMPRC noted that the *Sixth CMRS Report* also contains untested and unverified anecdotal statements from various cellular and PCS carriers.⁹⁵

As discussed above, a little over a month after the first round of Track A hearings concluded, Qwest filed a motion to reopen the Track A proceedings so that new evidence, the Cricket survey and statistical analyses, could be considered.⁹⁶ As it did before the NMPRC, Qwest continues to assert the Cricket survey and analyses were conducted in accordance with the guidance provided by the FCC in the *BellSouth Louisiana II Order*.⁹⁷

Qwest retained FrederickPolls and Voter/Consumer Research ("VCR") to conduct a telephone survey of Cricket residential subscribers in the Albuquerque and Santa Fe areas to show that New Mexicans were in fact using Cricket PCS service as a competitive alternative to Qwest wireline service.⁹⁸ The survey consisted of five questions. The relevant questions appear below:⁹⁹

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⁹³ *Id.* at 58-59 & nn. 165 & 166.

⁹⁴ *Id.* at 59 & nn.167.

⁹⁵ *Id.* at 59 & n.146.

⁹⁶ *Id.* at 59.

⁹⁷ *Id.* at 59-60 & n.169; Qwest's Brief, at 17.

⁹⁸ *Final Order* (Qwest Application, NM App. C, Tab 19), at 60 & n.170.

⁹⁹ Question 1 merely established that the respondent was over 18 and was the Cricket bill payer. *Id.* at 60 & n.171.

2. When some people need to start phone service, they might decide to use the Cricket phone instead of having traditional wire line phone service hooked up in their home. *Does this apply to you?*
3. Some Cricket customers might decide that Cricket service does away with the need to have traditional wire line phone service in their home. As a result, they terminate their wire line phone services from the local phone company. *Does this apply to you?*
4. Thirdly, some Cricket phone users might find that having Cricket means they can cancel phone service on a second or additional telephone line in their home. *Does this apply to you?*
5. Lastly, some Cricket customers might find that using the Cricket service from inside their home replaces the need to add a new or additional telephone line. *Does this apply to you?*¹⁰⁰

This study was subjected substantial criticism during the NMPRC's second round of Track

A hearings. The objections included the following:

1. The survey was an “agree/disagree” survey type, which is commonly perceived as being unreliable.
2. The use of the words “some” and “might” were likely to elicit only hypothetical responses (this point also coincides with the next).
3. Many responses to questions were nonsensical because they overlapped. Overlap occurred when a respondent gave inconsistent answers to questions 2 through 5. For example, answering yes to questions 2 and 3 would mean the respondent had never hooked-up a wireline phone but also disconnected their existing wireline phone. This overlap is present in more than 30% of all responses and appears in almost 90% of the yes answers to question number 3. Overlap also occurred with respect to questions 4 and 5.
4. It is unclear if respondents understood the questions, and specifically, the meaning of the term “wireline”. No definition was given during the first round of the survey. Moreover, the Attorney General pointed out that when asked what “wireline service is” the person who designed the survey, Keith Frederick, had difficulty answering the question. Mr. Frederick agreed that there is no validity to a survey if the respondents do not understand the questions.
5. Qwest's failure to perform a pre-test of the survey. By pre-testing the survey Qwest could have refined it and eliminated many of the problems identified by the opposing parties. The NMPRC found

¹⁰⁰ *Id.* at 60 & n.172.

Qwest's failure in this regard to be virtually indefensible given that (a) the first portion of the survey was conducted in two distinct time periods¹⁰¹ and (b) the NMPRC's Order on Reopening the Track A Proceedings expressly discussed pre-testing in its guidance concerning statistical surveys.¹⁰²

After the first part of the Cricket survey was completed, Qwest amended it to include a callback.¹⁰³ This second part of the survey consisted of a single question: "Do you have wireline local telephone service in your home?" Additionally, if the respondent indicated that he or she did not understand the term "wireline," a definition was provided. Qwest estimated that the two parts of the Cricket survey considered together indicate that at least 7% of Cricket subscribers, or 3,180 to 3,450 New Mexicans, have terminated all Qwest wireline service in favor of Cricket. Qwest suggested that the amount of wireline replacement in its New Mexico territory is actually much higher. Qwest contends the evidence shows 18.5% of the Cricket subscribers surveyed (approximately 8,410 to 9,410 residents in Albuquerque and Santa Fe) answered "yes" when asked whether they terminated their traditional wireline telephone service as a result of their Cricket service, and then answered "no" to the callback question. Additionally, Qwest maintains the

¹⁰¹ The first 907 numbers were called in the beginning of December and the remaining 8,219 numbers were called in the beginning of January. The NMPRC believes it is likely that FrederickPolls and/or VCR noticed the overlap problem and other deficiencies with the survey after the first 1000 numbers were called. *Id.* at 61 & n.179.

¹⁰² The NMPRC's Order on Reopening the Track A Proceedings, which permitted Qwest to file a motion to reopen the Track A proceedings and suspended the briefing schedule, offered the following guidance:

Although Qwest's Motion is not entirely clear on the issue, its "survey" and "supporting materials" apparently will be in the form of the statistical "studies or other objective analyses" alluded to and analyzed in [the *BellSouth Louisiana II Order*, ¶¶ 31-43]. Judging just from the Motion's reference in footnote 2 to paragraph 31 of the *BellSouth Louisiana II Order*, this may be what Qwest is alluding to. If the "survey" is in the form of a statistical analysis, the following questions go to the type of information that should be presented in a proper motion to reopen: (1) How was the survey sample size determined? (2) What were the statistical objectives of the survey? (3) How were the participants in the survey selected? (4) Did the survey include only Cricket users? Why or why not? (5) How were the results adjusted, if at all, to reflect non-responses (*i.e.*, how has the statistical analysis dealt with individuals who were asked to participate in the survey but chose not to participate)? (6) Was the questionnaire pre-tested in order to uncover potential problems, such as ambiguous wording? If so, such pre-testing should be explained.

Id. 62 & n.180.

responses to the callback question alone indicate that between 16,110 and 17,490 Cricket subscribers (or 35.5% of 45,370 to 49,260 Cricket subscribers) in New Mexico do not have Qwest wireline service.¹⁰⁴

The second part of the Cricket survey likewise was subjected to significant objections, which consisted essentially of the following:

1. Participants in the callback (a.k.a., “the sample group”) were not randomly selected. The participants had all previously answered yes to question 3, so they had prior knowledge of and exposure to the survey. Dr Daniel, the Attorney General’s witness, testified that this clearly ties the callback to the first part of the survey. Thus, the inferences made by the study are suspect because the respondents were not randomly selected. And, the problems associated with the earlier portions of the survey cannot be separated from the results of the latter part.
2. The definition of “wireline” was only given if the respondent asked for clarification. It is likely that a number of respondents would fail to ask for the definition even if they were not sure of the meaning of “wireline.”
3. The survey did not distinguish between business and residential Cricket PCS customers. Moreover, the survey failed to establish that the respondents were not also denied service by Qwest for failure to make payments. Thus, there is no evidence of facilities-based residential competition or substitution.
4. The callback was completed short of the 3-month time period recommended by the Commission. Therefore, there is no evidence any long-term substitution.
5. The survey was entirely result driven. That is, Qwest professed that the survey showed PCS for wireline substitution before the survey was even completed.

The NMPRC found that Qwest submitted reasonable responses to a limited number of these objections. For example, the NMPRC found that Qwest convincingly showed that it knew the

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¹⁰³ *Id.* at 62 & n.181.

¹⁰⁴ *Id.* at 62-63 & nn. 181-186.

sample questions were only presented to residential customers because the screening was done during the first round of questions.¹⁰⁵ Nevertheless, the NMPRC found Qwest did not provide persuasive responses to all of the credible objections respecting the Cricket survey and statistical analyses.

C. Track A Conclusions

2. In the final analysis, the NMPRC was unable to find substantial, credible evidence in the record of its Track A proceedings that would enable it to conclude with any measure of confidence that competitors are serving more than a *de minimis* number of residential end users in Qwest's service area in New Mexico. The NMPRC found that the resale carriers cited by Qwest are not providing consumers with an actual competitive alternative. The NMPRC also found significant problems inherent in the design, methodology and implementation of the Cricket survey. Given these problems, the NMPRC was constrained to find that the only credible PCS-related evidence in its record was anecdotal evidence indicating Cricket is a PCS carrier in New Mexico that is positioning itself through advertisements to be a competitor of Qwest.

Having so found, the NMPRC likewise found it hard to believe that Cricket is serving in excess of 40,000 New Mexicans without a significant number of these customers engaging in some form of wireline substitution. Nevertheless, as the NMPRC concluded in its *Final Order*,

suppositions aside, there is no single exhibit, strand of testimony or other piece of evidence that proves with any degree of reasonable certainty – let alone evidence sufficient to fulfill the substantial evidence standard that Commission orders must satisfy – that Qwest has met its burden of showing there is an actual and significant number of Cricket subscribers in Qwest's New Mexico territory who have substituted broadband PCS service for Qwest wireline service.¹⁰⁶

¹⁰⁵ Tr. 6/10/02, Exh. Vol. I, Qwest Exh. 8 (Frederick Rebuttal), pp. 19-20.

¹⁰⁶ *Id.* at 65-66.

Given the significant issues of first impression presented coupled with the NMPRC's consultative role pursuant to section 271(d)(2)(B) of the Act, the NMPRC resolved that the most appropriate course was for it to present its findings as the same are set forth in its *Final Order* and in the record of the NMPRC proceedings generally without rendering a dispositive recommendation respecting compliance or non-compliance with Track A.¹⁰⁷ In this regard, the NMPRC has observed that both the Maine Public Utilities Commission and the Arkansas Public Service Commission chose a similar course when faced with less novel questions going to whether the respective degree of facilities-based residential competition in each state was sufficient to satisfy the Track A test.¹⁰⁸

Given the substantial record developed by the NMPRC in its Track A proceedings as well as any other relevant information the Commission may have at its disposal during this 90-day review process, the NMPRC retains every confidence that the Commission, with the resources at its disposal and the expertise in this area, will be able to suitably resolve the issues of first impression presented by Qwest's Track A case for New Mexico.

¹⁰⁷ *Id.* at 66.

¹⁰⁸ *Id.* at 66 & n.199.

IV. THE 14-POINT COMPETITIVE CHECKLIST

The NMPRC addressed compliance with the 14-point competitive checklist first by independently reviewing the record developed in the Multi-State Proceeding, along with the Facilitator's reports and the post-report comments submitted by Qwest, Staff and intervenors. The NMPRC thereupon conducted state-specific proceedings that included the submission of briefs, oral arguments, and in certain instances, additional New Mexico-specific evidentiary proceedings.

In its first interim order, the NMPRC found Qwest in compliance with checklist items 3 and 12, subject to Qwest modifying its SGAT in conformity with the NMPRC's instructions.¹⁰⁹ In that order the NMPRC also found Qwest in "provisional" compliance with checklist items 7, 8, 9 and 10.¹¹⁰ The findings of compliance were provisional because the NMPRC conditioned findings of full compliance on Qwest (i) resolving during the course of the NMPRC's section 271 proceedings specific issues identified in the order, (ii) complying with the SGAT compliance requirement, and (iii) satisfying any and all ROC OSS testing aspects associated with these checklist items. Except for 3, 6 and 12, for which the NMPRC found have no separate OSS functions associated with them,¹¹¹ the NMPRC's interim orders followed the compliance standards and criteria established in the *Paper Workshop Order* for each of the remaining checklist items. In the final analysis, the NMPRC found that Qwest was in full compliance with checklist items 3, 7, 8, 9, 10 and 12, as ultimately was the case for the remaining checklist items.¹¹² A summary of the NMPRC's findings and conclusions with respect to the remaining checklist items is presented below after the section on performance data.

¹⁰⁹ *Paper Workshop Order*, (Qwest Application, NM App. C, Vol. 1, Tab 2), at 12-15, 23-24, 25, 26.

¹¹⁰ *Id.* at 15-23, 25-26.

¹¹¹ *Id.* at 15, 24; *OSS Order*, (Qwest Application, NM App. C, Vol. 1, Tab 18), at 15, n.69, 16 & n.73.

¹¹² *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 147.

A. Commercial Performance Data

The NMPRC addressed Qwest's actual commercial performance and the reliability of Qwest's reported data in the NMPRC's *OSS Order*. Concerning the data reconciliation study conducted by ROC third-party vendor Liberty, although the NMPRC was somewhat troubled by the discernible pattern of Qwest personnel not handling orders and troubles as required by the PIDs, the NMPRC accepted as correct Liberty's data reconciliation findings that Qwest's performance reporting accurately and reliably report Qwest's actual performance.¹¹³

As for Qwest's actual commercial performance, the NMPRC was unable to conclude definitively at the time it issued the *OSS Order* that Qwest had satisfactorily demonstrated that it was providing functions and services to CLECs was in a manner that is either substantially the same time and manner as Qwest provides its retail operations, or in a manner that provides CLECs with a meaningful opportunity to compete. The NMPRC's conclusion at that time was driven in part by the concerns expressed in the post-ROC OSS report proceedings before the NMPRC by Staff and AT&T going to the excessive rate of human error detected by KPMG in Qwest's manual processing of CLEC orders, a problem which the NMPRC found may have affected the accuracy and reliability of Qwest's reported performance results.¹¹⁴ The NMPRC further noted that AT&T's and Staff's concerns were echoed by the United States Department of Justice ("DOJ") in its comments to the Commission regarding Qwest's initial section 271 application.¹¹⁵ The DOJ reported to the Commission that the lack of any regularly reported commercial performance data on the accuracy of

¹¹³ *OSS Order* (Qwest Application, NM App. C., Vol. 1, Tab 18), at 13.

¹¹⁴ *Id.* at 16-17.

(footnote continued from previous page)

¹¹⁵ *Id.* at 17. See *In the Matter of the Application by Qwest Communications, International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Nebraska, and North Dakota*, WC Docket No. 02-148, Evaluation of the United States Department of Justice (July 23, 2002) (*First Qwest Evaluation*).

its manual order processing rendered the record of Qwest's first section 271 application "incomplete," a fact that the DOJ characterized as a "serious issue, particularly given the expert tester's *carefully expressed concerns*."¹¹⁶ The NMPRC noted, moreover, that while the DOJ reported progress in its *Second Qwest Evaluation* with respect to Qwest remedying certain of the issues attending the manual order processing problems through the production of additional data pursuant to a new proposed PID, PO-20, as well as other remedial measures, the DOJ nevertheless was unable to give the Commission an unqualified endorsement of Qwest's second section 271 application.¹¹⁷ The NMPRC thus concluded that Qwest should be found in provisional compliance with checklist items 1, 2, 4, 5, 7-11, and 13-14, subject to the Commission satisfying the concerns respecting manual service order accuracy expressed by the both the parties before the NMPRC and the DOJ in its evaluations of Qwest's first two section 271 applications.¹¹⁸

The NMPRC notes the concerns expressed in the *OSS Order* have been resolved to the satisfaction of the Commission in its order granting Qwest's consolidated application for in-region, interLATA authority in nine states in Qwest's region.¹¹⁹ Therefore, the Commission should regard the NMPRC's recommendation with respect to Qwest's compliance with checklist items 1, 2, 4, 5, 7-11, and 13-14 as having been amended in accordance with the Commission's findings and conclusions in its *Qwest 271 Order*.

¹¹⁶ *First Qwest Evaluation*, at 16-22 (emphasis added).

¹¹⁷ *OSS Order* (Qwest Application, NM App. C., Vol. 1, Tab 18), at 17-18. *See In the Matter of the Application by Qwest Communications, International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Montana, Utah, Washington, and Wyoming*, WC Docket No. 02-189, Evaluation of the United States Department of Justice (Aug. 21, 2002) (*Second Qwest Evaluation*), at 12-13.

¹¹⁸ *OSS Order* (Qwest Application, NM App. C., Vol. 1, Tab 18), at 18-19.

¹¹⁹ *In the Matter of Application of Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02 – 314, Memorandum Opinion and Order, FCC-02-332, ¶¶ 98-104 (rel. Dec. 23, 2002) (*Qwest 271 Order*).

B. Checklist Item No. 1 – Interconnection and Collocation

The NMPRC found Qwest in provisional compliance with its interconnection and collocation obligations pursuant to section 271(c)(2)(B)(i) of the Act in its *Group 2 Order*.¹²⁰ AT&T, Qwest and e.spire Communications, Inc. (“e.spire”) filed motions for rehearing that were addressed by the NMPRC in its *Order on Rehearing Portions of Group 2 Order (Group 2 Rehearing Order)* issued on January 22, 2002.¹²¹ With respect to the interconnection and collocation issues addressed in the *Group 2 Rehearing Order*, the NMPRC concluded that the provisioning intervals for collocations involving major infrastructure modifications should be 150 days, which represents an extension by 60 days of the standard 90-day interval for completing collocation arrangements. Pursuant to the express terms of the SGAT, any such extension would be available to Qwest only after it obtains a waiver from the NMPRC if the need for, or the duration of, a particular extended interval is disputed by the affected CLEC.¹²² Additionally, the NMPRC concluded that the SGAT description of “entrance facilities” should be expanded beyond that seemingly recommended by the Facilitator to provide for interconnection using entrance facilities at any technical feasible point of interconnection (“POI”) chosen by the CLEC, including for interconnection for access to UNES.¹²³

Inasmuch as all outstanding issues have been addressed to the NMPRC’s satisfaction with respect to checklist item 1, the NMPRC recommends that Qwest be found to be in compliance with section 271(c)(2)(B)(i) of the Act.

¹²⁰ Qwest Application, NM App. C, Vol. 1, Tab 3, at 3-45.

¹²¹ Qwest Application, NM App. C, Vol. 1, Tab 7.

¹²² *Id.* at 5.

¹²³ *Id.* at 7-10.

C. Checklist Item No. 2 – Unbundled Network Elements

In its *Group 4 Order* entered November 21, 2001,¹²⁴ the NMPRC provisionally concluded that Qwest was in compliance with its obligation to provide “[n]ondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1).”¹²⁵ The Commission will find the NMPRC’s findings and conclusions regarding the numerous UNE and UNE combinations impasse issues in the *Group 4 Order*, at pp. 6-20. Given that all outstanding issues have been addressed to the NMPRC’s satisfaction with respect to checklist item 2, the NMPRC accordingly recommends that Qwest be found to be in compliance with section 271(c)(1)(B)(ii) of the Act. However, because checklist item 2 incorporates non-discriminatory access to OSS and the Act’s wholesale pricing requirements pursuant to 47 U.S.C. §§ 251(c)(2), 251(c)(3), and 252(d)(1),¹²⁶ the NMPRC offers the following summary of its findings and conclusions respecting these two additional aspects of checklist item 2.

1. Access to Operational Support Systems – the ROC OSS Test

In its *Procedural Order Regarding OSS-Related Matters* issued on December 18, 2001,¹²⁷ the NMPRC directed the parties to submit verified comments and exceptions within fourteen days after publication of the *ROC Final Report* followed shortly thereafter by any desired rebuttal. After receiving the parties’ comments, exceptions and rebuttal, the NMPRC conducted hearings regarding the OSS-Related matters on July 1st and 2nd, 2002. At the NMPRC’s OSS hearings, representatives of the ROC vendors – KPMG, Liberty, MTG Consulting, and Hewlett Packard – provided testimony

¹²⁴ Qwest Application, NM App. C, Vol. 1, Tab 5, at 2-21.

¹²⁵ 47 U.S.C. § 271(c)(2)(B)(ii).

¹²⁶ See 47 U.S.C. §§ 271(c)(2)(B)(i) (interconnection) and 271(c)(2)(B)(ii) (UNEs).

¹²⁷ As amended by the NMPRC’s *Order Amending Procedural Order regarding OSS-Related Matters* (Feb. 19, 2002). See Qwest Application, NM App. K, Vol. 1, Tabs 981, 1063 & 1180 (Errata Notice). The NMPRC considered the “OSS-Related matters” to consist of the *ROC Final Report*, Qwest’s actual commercial performance, Liberty’s data reconciliation, and the redesign of Qwest’s change management process.

and were subject to cross-examination as were witnesses for Qwest, AT&T and Staff.¹²⁸ The NMPRC's comments regarding Qwest's actual commercial performance and Liberty's data reconciliation, the findings and conclusions on which may be found in the NMPRC's *OSS Order*,¹²⁹ are summarized above in section IV.A of these comments.

The NMPRC's review of the *Final ROC Report* and the alleged deficiencies in Qwest's OSS functions are contained in the *OSS Order*. The NMPRC concluded that Qwest had satisfied most of the applicable requirements of checklist item 2 and the other affected checklist items by providing OSS functions in a nondiscriminatory manner, in the same time and manner as its provides to its retail customers, and in a manner that allows competitors a meaningful opportunity to compete. However, in order for it to be able to present an unqualified recommendation to the Commission of compliance with the requirements of checklist item 2 and the other checklist items having OSS functions associated with them,¹³⁰ the NMPRC concluded that Qwest must satisfactorily address the findings and conclusions set forth in the *OSS Order* respecting the manual handling of orders, pre-order/order integration, electronically auditable billing, and the stand alone test environment.¹³¹ Inasmuch as Qwest has addressed the problems addressed in the *OSS Order* to the satisfaction of the Commission,¹³² the NMPRC recommends the Commission find that Qwest has demonstrated it provides non-discriminatory access to OSS in New Mexico.¹³³

¹²⁸ See Qwest Application, NM App. K, Vol. 1, Tabs 1327-1355 (transcripts of proceedings and exhibits).

¹²⁹ Qwest Application (NM App. C, Vol. 1, Tab 18), at 2-19.

¹³⁰ That is, checklist items 1, 4, 5, 7-11, 13 and 14. 47 U.S.C. §§ 271(c)(2)(B)(i), (iv), (v), (vii) – (xi), (xiii) & (xiv).

¹³¹ Qwest Application (NM App. C, Vol. 1, Tab 18), at 30-38, 57-58, 64-69.

¹³² *Qwest 271 Order*, ¶¶ 34-171.

¹³³ See Qwest Application, NM App. K, Vol. 1, Tabs 1327-1355 (transcripts of proceedings and exhibits).

2. Pricing of Interconnection and UNEs

On September 30, 1997, the NMPRC's predecessor in the regulation of telecommunications companies in the State of New Mexico, the State Corporation Commission ("SCC"), entered an order consolidating its then-existing cost proceedings to implement the SCC's decision to conduct its own cost study for determining the forward-looking cost of providing services supported by the federal universal service support mechanism pursuant to the Commission's Report and Order in CC Docket No. 96-45, *In the Matter of Federal-State Joint Board on Universal Service* (rel. May 8, 1997).¹³⁴ Phase I of the SCC's cost proceedings was limited to issues related to the costing methodology for UNEs and UNE cost issues involved in sizing universal service support. Declaring its intention to follow the Commission's pricing methodologies, including TELRIC ("Total Element Long Run Incremental Cost"),¹³⁵ in Phase I the SCC set permanent, TELRIC-based prices for key network elements, including 2- and 4-wire loops (deaveraged for three zones), tandem switching, tandem switched local transport, extension technology, DS-1 and DS-3 direct trunked transport, and others.¹³⁶ Upon coming into existence on January 1, 1999, the NMPRC inherited Phase II of the SCC's cost proceedings, in which interim rates were set for non-recurring charges, OSS, collocation and shared transport.¹³⁷

¹³⁴ *In the Matter of the Consideration of the Adoption of a Rule Concerning Costing Methodologies and In the Matter of the Implementation of New Rules Related to the Rural, High Cost, and Low Income Components of the New Mexico Universal Service Fund*, Docket Nos. 96-310-TC & 97-334-TC [NMPRC Utility Case No. 2917], Findings of Fact and Conclusions of Law and Order, (N.M. SCC, July 15, 1998) (*Phase I Order*) (Qwest Application, NM App. C., Vol.2 Tab 1).

¹³⁵ *Id.* ¶¶ 15–22.

¹³⁶ *Id.* ¶¶ 332–360.

¹³⁷ See Docket Nos. 96-310-TC & 97-334-TC, Supplemental Findings of Fact, Conclusions of Law and Order (Dec. 31, 1998) (*Phase II Order*) (Qwest Application, NM App. Vol.2 Tab 3); Docket Nos. 96-310-TC and 97-334-TC and NMPRC Utility Case No. 2917, Order on Motion for Reconsideration of Phase II Order (Sept. 7, 1999) (Qwest Application, NM App. C., Vol.2 Tab 4) (*Phase II Order on Reconsideration*).

On October 17, 2000, the NMPRC initiated its current Cost Docket, Utility Case No. 3495,¹³⁸ for the purposes of establishing permanent rates for interconnection and access to UNEs and UNE combinations. The principles guiding the NMPRC towards this goal is the Act, which requires that the price of interconnection and UNEs be cost based,¹³⁹ and the TELRIC pricing methodology established by the Commission in the *Local Competition First Report and Order*.¹⁴⁰

Since many of the interim rates had been in effect at least since the entry of the NMPRC's *Phase II Order on Reconsideration* and because certain interim rates contained in Exhibit A to Qwest's SGAT had not been evaluated in the intervening years, the NMPRC concluded that while setting Qwest's permanent UNE rates remained the primary concern, an expedited review of the rates contained in Exhibit A, including the issue of a refund or true-up, was in order, and that it was necessary to adjust Qwest's interim rates to reflect the changes that have occurred in the telecommunications industry since the NMPRC last took a detailed look at these rates in 1998 and 1999; this was the NMPRC's "Phase A" proceeding in the Cost Docket.¹⁴¹

The NMPRC concluded that the review of the interim rates in Phase A would serve two purposes. First, since the NMPRC had not reviewed some of the interim rates, the process would afford the NMPRC an opportunity to evaluate the reasonableness of the rates prior to the establishment of permanent rates. Additionally, final rates – to be set in "Phase B", a comprehensive cost proceeding in which the NMPRC held evidentiary hearings in December 2002 and January

¹³⁸ Utility Case No. 3495 is captioned *In the Matter of the Consideration of Costing and Pricing Rules for OSS, Collocation, Shared Transport, Non-Recurring Charges, Spot Frames, Combination of Network Elements and Switching* (hereinafter referred to as the "Cost Docket").

¹³⁹ 47 U.S.C. § 252.

¹⁴⁰ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, First Report and Order, 11 FCC Rcd 15499, ¶ 167 (rel. Aug. 8, 1996) (*Local Competition First Report and Order*). See generally *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 384-85 (1999) (upholding FCC's jurisdiction to prescribe TELRIC pricing methodology).

2003 – would not be established prior to Qwest’s submission to the Commission of its section 271 application for New Mexico, and in order to ensure that on an interim basis Qwest’s rates are reasonable, it was appropriate to review the reasonableness of the interim rates in an expedited proceeding and to address the issues of refund and true-up, and concurrently establish a procedural schedule for expedited consideration of the interim rates.

Phase A hearings were held, and evidence was taken therein. During the hearings, the Bench requested that Qwest provide a comparison of its existing rates, proposed Phase B rates, and Qwest’s Washington rates.¹⁴² Qwest’s Washington SGAT rates were included in the comparison to provide a benchmark for judging the reasonableness of Qwest’s current New Mexico SGAT and proposed Phase B rates.¹⁴³ The Washington Utilities and Transportation Commission (“WUTC”), which has jurisdiction over Qwest in Washington state, has completed a number of hearings concerning UNE and interconnection rates. The WUTC has stated that the rates it has adopted in its costing and pricing proceedings are compliant with the FCC’s pricing rules.¹⁴⁴ After the hearings in Phase A concluded, the parties submitted post-hearing briefs and the Hearing Examiner thereafter issued her *Phase A Recommended Decision* on June 6, 2002.¹⁴⁵

On August 27, 2002, the NMPRC issued its *Phase A Order*, which adopted the *Phase A Recommended Decision* except as modified with respect to specific rate clarifications. Further, the

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¹⁴¹ *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 17 & n.44.

¹⁴² *Id.* at 18 & n.46.

¹⁴³ *Id.* at 18 & n.47.

¹⁴⁴ See Washington Utilities and Transportation Commission, *In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements Transport and Termination, and Resale*, Docket UT-960369 and *In the Matter of the Continued Costing and Pricing Proceeding for Interconnection, Unbundled Network Elements, Transport and Termination, and Resale*, Docket No. UT-003013.

¹⁴⁵ Qwest Application, NM App. C, Vol. 2, Tab 5 (*Phase A Recommended Decision*).

NMPRC ordered Qwest to file a corrected Exhibit A that complied with the *Phase A Recommended Decision* as modified by the *Phase A Order*. However, the *Phase A Order* did not address the modifications to Exhibit A caused by Qwest's "benchmarking" process in which Qwest offered to voluntarily reduce a considerable number of the rates approved in the *Phase A Order*. Qwest indicated that the Exhibit A filed on July 19, 2002 with the NMPRC contained new, lower rates for certain UNEs and local interconnection service ("LIS") elements. After reviewing Qwest's proposed rates, the Bench issued two requests for additional information.

In response to the NMPRC's Bench Request For SGAT Compliance Review, Qwest provided the reasons why it believed the NMPRC should permit the rates set forth in its July 19, 2002 Exhibit A to go into effect 60 days after its submission pursuant to section 252(f)(3)(B) of the Act. Qwest explained that the latest SGAT filing includes rates for several UNEs not previously covered in the Cost Docket, the interim rates set forth in the *Phase A Recommended Decision*, and "benchmark" recurring and non-recurring rates based on the rates set by the Colorado Public Utilities Commission for most loop-related UNEs. Qwest stated that the vast majority of rates listed in the July 19, 2002 Exhibit A are lower than the prices the NMPRC has previously approved and are below the prices Qwest previously filed in Phase B of the current Cost Docket. Thus, Qwest believed the rates in its July 19, 2002 Exhibit A would benefit New Mexico consumers and CLECs such that permitting the rates to into effect would be in the public interest.

Qwest maintained that in setting the benchmarked rates it adhered to the procedure described by the Commission in the section 271 orders issued for New Jersey and Rhode Island.¹⁴⁶ However,

¹⁴⁶ See *In the Matter of Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a/ Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, Memorandum Opinion and Order, 17 FCC Rcd 12275, ¶ 49 (rel. Jun. 24, 2002) (*Verizon New Jersey Order*); *In the Matter of Application by Verizon New England Inc., Bell Atlantic Communications, Inc., (d/b/a Verizon Long*

Qwest contended there was no need for the NMPRC to examine how Qwest performed the benchmarking process because the Commission will perform this analysis using its cost model and its benchmarking standards.

Qwest further indicated that it was neither requesting final approval of the benchmarked rates nor a determination that these rates satisfy TELRIC requirements. Instead, Qwest suggested the NMPRC should simply find that because the rates are generally lower than existing rates, it is in the public interest to permit them to take effect until the NMPRC sets final rates following a review of Qwest's forward-looking costs in Phase B of the Cost Docket.

Finally, while Qwest maintained there is currently no price squeeze in New Mexico, it averred that the new lower benchmarked rates remove any possible doubt on the issue. Thus, it urged the NMPRC to permit the July 19, 2002 Exhibit A rates to take effect to ensure an appropriate, relevant price squeeze analysis as part of the public interest portion of the section 271 proceedings.¹⁴⁷

In the DOJ's *Second Qwest Evaluation*, the Department observed, "Qwest failed to adjust the [Commission's USF] model's cost estimates to reflect the sale of certain high-cost exchanges [footnote omitted]. Due to this oversight, the cost estimates in regions that have lost exchanges are likely too high on average."¹⁴⁸ As a consequence, the NMPRC instructed Qwest to provide information and/or documentation as to whether the same process used to benchmark the rates in New Mexico was used by Qwest in the states addressed in the *Second Qwest Evaluation*. Assuming,

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Distance), *NYNEX Long Distance Company* (d/b/a *Verizon Enterprise Solutions*), *Verizon Global Networks Inc.*, and *Verizon Select Services Inc.*, for Authorization to Provide In-Region, InterLATA Services in Rhode Island, CC Docket No. 01-324, Memorandum Opinion and Order, 17 FCC Rcd 3300, ¶¶ 38-39 (rel. Feb. 22, 2002) (*Verizon Rhode Island Order*).

¹⁴⁷ See *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 99-111.

moreover, that the same process was employed, the NMPRC directed Qwest to describe the impact on the proposed New Mexico rates if the DOJ's concern might be remedied by excluding the high-cost exchanges addressed in the *Second Qwest Evaluation*.

After considering Qwest's and Staff's briefs in this matter, the NMPRC found that the changes to Exhibit A proposed in Qwest's responses satisfied the NMPRC's concerns insofar as Qwest agreed to amend its SGAT to reflect the lower of (i) the rate previously established in the *Phase A Order*, or (ii) the rate resulting from Qwest's subsequent benchmark analysis.¹⁴⁹ Accordingly, the NMPRC concluded it would be appropriate to allow the rates set forth in Exhibit A to the 10th Revised SGAT, as filed by Qwest on August 30th 2002 and subsequently corrected and modified, to take effect on October 29, 2002.¹⁵⁰ The NMPRC found that the rates so approved would advance the public interest based on the simple determination that the rates are equal to or lower than the rates the NMPRC recently approved on an interim basis in its *Phase A Order*.¹⁵¹ Nevertheless, consistent with the conclusion reached in the *Phase A Recommended Decision*, the NMPRC took no position concerning the extent to which the benchmarked rates are TELRIC compliant.¹⁵² The NMPRC nonetheless noted for the record Qwest's claim that "wholesale rates that are too low do create the risk of skewing CLEC decisions to lease or build facilities and impeding the development of facilities-based competition. The reduced rates Qwest is proposing, however, do not approach the level at which such a risk would arise."¹⁵³

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¹⁴⁸ *Second Qwest Evaluation*, at 32.

¹⁴⁹ *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 24.

¹⁵⁰ *Id.* at 23.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

The NMPRC notes for the record that the Commission has found the Colorado “anchor state” rates “are consistent with TELRIC principles and meet the requirements of checklist item two.”¹⁵⁴ The NMPRC further notes that the rates Qwest proffered in support of its section 271 application for the states of Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming contain UNE rates the Commission has concluded “fall within a range of rates that a reasonable application of TELRIC would produce” such that the UNE rates for these “benchmark states” satisfy the requirements of checklist item 2.¹⁵⁵ Finally, the NMPRC notes Qwest’s submission in support of the instant application to the effect that the benchmark analysis employed before the NMPRC is “identical” to the one approved in by the Commission in its *Qwest 271 Order*.¹⁵⁶ Having reviewed Qwest’s submission, the NMPRC has discerned no basis for doubting Qwest’s assessment.

Finally, the NMPRC notes for the Commission that Qwest recently proposed to add prices for “Quote Preparation Fee – Augment” (“QPF-A”) to SGAT sections 8.3.1 (Cageless Physical Collocation) and 8.4.1 (Caged Physical Collocation). Qwest describes the QPF-A as a reduced fee for preparing a price quotation when a collocated carrier seeks to modify or augment its existing physical collocation facility. Qwest proposed the QPF-A rates in New Mexico apparently at the behest of the Commission, which in approving Qwest’s nine-state application looked favorably on an “augment QPF ... that offers collocation augments to a competitive LEC’s facilities at lower rates than those charged to OneEighty for this service.”¹⁵⁷ In an order entered January 28, 2003, the

¹⁵⁴ *Qwest 271 Order*, ¶¶ 181, 192.

¹⁵⁵ *Id.* ¶¶ 181, 310-311.

¹⁵⁶ Qwest’s Brief, at 149-153.

¹⁵⁷ *In the Matter of Application of Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02 – 314, Memorandum Opinion and Order, FCC-02-332, ¶ 333 (rel. Dec. 23, 2002).

NMPRC determined that the QPF-A rates should take effect on February 3, 2003 on an interim basis subject to the following conditions: (i) the QPF-A rates will be reviewed by the NMPRC in Phase D of the Cost Docket pursuant to 47 U.S.C. § 252(f)(4); and (ii) Qwest must file in Phase D cost support for the QPF-A rates that complies with the NMPRC's wholesale costing and pricing rules.

In sum, the NMPRC recommends the Commission find Qwest has satisfied the requirements of checklist item 2 as they pertain to New Mexico.

D. Checklist Item No. 4 – Unbundled Loops

The NMPRC first considered Qwest's duty to provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services" pursuant to section 271(c)(2)(B)(iv)¹⁵⁸ in the *Group 4 Order*.¹⁵⁹ The NMPRC concluded that the number of issues remaining to be satisfactorily addressed and/or completed by Qwest – coupled with the significance of the outstanding issues to affording competing carriers a meaningful and lasting opportunity to compete in the local telecommunications market in New Mexico – militated against a finding of compliance with checklist item 4 at the time the *Group 4 Order* was issued in November 2001. The NMPRC imparted that its recommendation to the Commission of compliance with checklist item 4 hinged on, among other things, Qwest resolving the outstanding matters identified in the *Group 4 Order* to the satisfaction of the NMPRC. The NMPRC thus held open the matter of

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Id. ¶¶ 346-47. See Utility Case No. 3495, Phase B hearing, Tr. 1/7/03, p. 7, ll. 3-10. (wherein counsel for Qwest, N. Robert Cutler stated, "We agree that those [QPF-A] rates are subject to some kind of a cost docket proceeding.... [T]he request ... actually came from the FCC.... [T]hey wanted a change made in the augment fee. So we did in the other nine states that were filed and naturally we did it here, too").

¹⁵⁸ 47 U.S.C. § 271(c)(2)(B)(iv).

¹⁵⁹ Qwest Application, NM App. C, Vol. 1, Tab 5, at 22-64.

checklist item 4 for further consideration following the requisite showing by Qwest that it is in full compliance with the applicable provisions of the *Group 4 Order*.¹⁶⁰

Subsequently, on February 12, 2002, the NMPRC held an oral argument on the motions for rehearing with respect to the *Group 4 Order* filed by AT&T and Qwest. The motions for rehearing focused exclusively on the NMPRC's resolution of certain checklist item 4 issues. The issues on rehearing were the following:

- (i) Qwest's objection to the standard loop provisioning intervals for DS-1 capable loops ordered by the NMPRC (*i.e.*, five days for 1 or more lines in high density zones and eight days for 1 or more lines in low density zones in accordance with NMPRC Rule 17.11.22.14(C)).¹⁶¹
- (ii) AT&T's and Qwest's dispute over CLEC access to Qwest's mechanized loop testing (MLT) as well as the related dispute over CLEC access to Qwest's LFACs database and other loop information databases.¹⁶²

Additionally, Qwest's motion for rehearing included a section detailing its purported "demonstration of compliance" with the major problem areas identified by the NMPRC in the *Group 4 Order*:

- (a) delays in the Roll-Out of ADSL and ISDN Capable Loops;¹⁶³
- (b) Qwest's discontinuation of Qwest DSL service when a Qwest customer switches to a UNE-P CLEC or reseller of voice services;¹⁶⁴ and
- (c) the development by Qwest of procedures for the provision of loop splitting to any CLEC ordering it and to provide EEL splitting on a special request basis.¹⁶⁵

At the oral argument, the NMPRC asked Qwest to furnish additional information concerning one of the outstanding compliance issues related to line splitting (as well as line sharing), *i.e.*,

¹⁶⁰ *Id.* at 63-64.

¹⁶¹ *Group 4 Order on Rehearing* (Qwest Application, NM App. C, Vol. 1, Tab 15), at 3-9. The NMPRC's rules define a "high density zone" to mean "all wire centers that the ILEC has classified within its lowest cost density pricing zone pursuant to 47 C.F.R. Section 69.123" whereas a "low density zone" refers to all wire centers not in the lowest cost density pricing zone. 17.11.22.7(M) & (R) NMAC.

¹⁶² *Group 4 Order on Rehearing* (Qwest Application, NM App. C, Vol. 1, Tab 15), at 9-16.

¹⁶³ *Id.* at 16-18.

¹⁶⁴ *Id.* at 18-22.

¹⁶⁵ *Id.* at 23-24.

discontinuation of Qwest DSL service.¹⁶⁶ On May 12, 2002, Qwest filed comments addressing that issue as well as two of the three issues asserted on rehearing – access to loop qualification information and MLT.¹⁶⁷ Qwest’s filing produced two additional rounds of briefing and a subsequent supplementation of the record by Qwest.

In its *Group 4 Order on Rehearing*, the NMPRC denied Qwest’s request to lengthen the standard loop provisioning interval for DS-1 loops beyond those set forth in the NMPRC’s rules and consequently ordered Qwest to revise the DS-1 service intervals in its SGAT Exhibit C to reflect those provided in 17.11.22.14(C) NMAC.¹⁶⁸ As for the remaining issues on rehearing, the NMPRC noted that AT&T and Qwest appeared to have made significant progress in resolving most of their differences surrounding access to loop qualification information and MLTs in workshop proceedings before the Arizona and Washington commissions. Therefore the NMPRC ordered Qwest to modify its SGAT in accordance with the language for SGAT §§ 9.2.2.8 and 9.2.2.8.6 approved by the Washington Utilities and Transportation Commission in its section 271 proceedings.¹⁶⁹

Remaining in dispute however, was the issue of unmediated (direct access to the LFACs database) versus mediated (electronic interfaces with the LFACs database such as the raw loop data tool that are akin to other interfaces to other Qwest OSS that is achieved through the IMA-GUI and IMA-EDI) access to loop qualification information. The NMPRC resolved the dispute by directing Qwest to modify the SGAT to include a revised § 9.2.2.2.1.1 that addressed Qwest’s concern that it be allowed to provide mediated access to underlying loop qualification information while at the

¹⁶⁶ *Id.* at 19. The NMPRC’s inquiry at the oral argument went to the impact, if any, DSL service provided by MSN (“MSN DSL service powered by Qwest Broadband” or “MSN Broadband”) to customers if and when such customers switch voice service to a CLEC, bearing in mind that it appeared to the NMPRC that Qwest and MSN were furnishing MSN Broadband customers who are Qwest customers a single, joint bill for services rendered.

¹⁶⁷ *Id.* at 2-3.

¹⁶⁸ *Id.* at 9.

same time guaranteed, as required by the Commission in the *UNE Remand Order* (¶¶427, 430 & 431), that CLECs have access to the same detailed information about an incumbent's loops that is available to the incumbent, in this case the back office detailed loop information that is accessible to Qwest's employees.¹⁷⁰ Finally, in the interests of ensuring a degree of certainty as to the efficacy of mediated access to underlying loop qualification information, the NMPRC decided that CLECs should be permitted to periodically examine whether Qwest is meeting its obligations to provide loop qualification data at parity with that which it possesses and makes available to its employees by affording CLECs the right to invoke the SGAT's audit provisions.¹⁷¹

As for Qwest's demonstration of compliance with checklist item 4, the NMPRC determined that Qwest's proffer of remedial SGAT language and development of nonstandard product offerings and processes satisfactorily addressed the NMPRC's concerns regarding discontinuation of Qwest DSL, the roll-out of ADSL and ISDN capable loops, and processes for offering loop and EEL splitting.¹⁷² The NMPRC consequently found Qwest in provisional compliance with section 271(c)(2)(B)(iv).¹⁷³ Accordingly, given that all outstanding issues have been addressed to the NMPRC's satisfaction with respect to checklist item 4, the NMPRC recommends that Qwest be found to be in compliance with section 271(c)(2)(B)(iv).

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¹⁶⁹ *Id.* at 13.

¹⁷⁰ *Id.* at 14-15.

¹⁷¹ *Id.* at 15-16.

¹⁷² *Id.* at 16-24.

¹⁷³ *Id.* at 25.

E. Checklist Item No. 5 – Unbundled Local Transport and EELs

The NMPRC addressed Qwest’s duty to provide “[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services”¹⁷⁴ pursuant to section 271(c)(2)(B)(v) in its *Group 4 Order*.¹⁷⁵ Given that the Facilitator also addressed Enhanced Extended Links (“EELs”)¹⁷⁶ as a checklist item 5 issue, the NMPRC considered EEL provisioning in the context of checklist item 5 as well.¹⁷⁷

The major disputed issues involving unbundled local transport involved Qwest’s creation in its SGAT Exhibit A of two rate elements for dedicated transport, Unbundled Dedicated Interoffice Transport (“UDIT”) and Extended Unbundled Dedicated Interoffice Transport (“EUDIT”) and its decision to not provide electronics at the CLEC end of unbundled transport.

Concerning the former issue, given the unchallenged finding that UDIT and the EUDIT are not separate UNEs but, instead, comprise a single UNE, the NMPRC decided that in the interim, pricing for the UDIT/EUDIT UNE (the entire dedicated transport link between points) should be based on a distance sensitive, flat rate charge, modeled on Qwest’s current UDIT rate structure. Qwest was given the option in the NMPRC’s cost docket of revising its UDIT/EUDIT rates to reflect the difference in the cost of service (assuming such a showing can be made).¹⁷⁸ As for the latter issue, the NMPRC agreed with the Facilitator’s conclusion that Qwest is under no obligation to provide electronics at the CLEC end of an EUDIT.¹⁷⁹

¹⁷⁴ 47 U.S.C. § 271(c)(2)(B)(v).

¹⁷⁵ Qwest Application, NM App. C, Vol. 1, Tab 5, at 64-71.

¹⁷⁶ In the *UNE Remand Order*, the FCC defined an EEL as consisting “of a combination of an unbundled loop, multiplexing/concentrating equipment, and dedicated transport.” 15 FCC Rcd at 3707 (¶ 15, under “Executive Summary”).

¹⁷⁷ *Group 4 Order* (Qwest Application, NM App. C, Vol. 1, Tab 5), at 72-75.

¹⁷⁸ *Id.* at 69-70.

¹⁷⁹ *Id.* at 71.

With respect to EEL provisioning, one of the two issues remaining at impasse concerned the commingling of UNEs and tariffed services in certain situations where Qwest refuses to construct UNEs. Finding that avoidance of access charges was not the motivating factor for CLECs in this instance, and that, in any event, the result would not be to avoid access charges (because rate or price ratcheting will not be permitted), the Facilitator proposed SGAT language allowing, under “controlled circumstances”, the connection of UNEs that CLECs want. The NMPRC accepted the Facilitator’s proposed language with a modification that makes clear that the provision should apply to situations where a CLEC is denied access to DS3 or higher bandwidth service as a retail service as well as DS1 loops.¹⁸⁰ The other issue at impasse concerned the Facilitator’s proposal to incorporate in the SGAT language that essentially waives termination liability assessments for circuits ordered as special access circuits between February 17, 2000, the effective date of the *UNE Remand Order*, and May 16, 2001, provided the CLEC identifies the circuits and notifies Qwest. AT&T argued the waiver start date should be pushed back to August 8, 1996 based on its assertion that Qwest has been obligated to provide combinations of UNEs since the effective date of the *Local Competition First Report and Order*. The NMPRC concluded the Facilitator’s proposal offered a balanced and judicious resolution of this issue.¹⁸¹

Therefore, the NMPRC provisionally concluded that Qwest be found in compliance with section 271(c)(2)(b)(v). There were no challenges to the NMPRC’s findings and conclusion regarding checklist item 5. Accordingly, given that all outstanding issues have been addressed to the NMPRC’s satisfaction with respect to checklist item 5, the NMPRC recommends that Qwest be found to be in compliance with section 271(c)(2)(B)(v).

¹⁸⁰ *Id.* at 74.

¹⁸¹ *Id.* at 75.

F. Checklist Item No. 6 – Unbundled Switching

In its *Group 4 Order*,¹⁸² the NMPRC provisionally concluded that Qwest was in compliance with its obligation to provide “[l]ocal switching unbundled from transport, local loop transmission, or other services” pursuant to section 271(c)(2)(B)(vi) of the Act.¹⁸³ There were no significant issues remaining at impasse that concerned New Mexico¹⁸⁴ when the NMPRC considered this matter. Moreover, no motions for rehearing were filed insofar as the NMPRC’s findings respecting checklist item 6 are concerned. Therefore, given that all outstanding issues have been addressed to the NMPRC’s satisfaction with respect to checklist item 6, the NMPRC recommends that Qwest be found to be in compliance with section 271(c)(2)(B)(vi) of the Act.

G. Checklist Item No. 11 – Local Number Portability

The NMPRC considered Qwest’s compliance section 271(c)(2)(B)(xi) of the Act in its *Group 2 Order*.¹⁸⁵ The sole issue at impasse concerning checklist item 11 presented to the NMPRC went to coordinating number portability and loop cutovers. In conditionally resolving this issue, the NMPRC endorsed Qwest’s proposal to change its LNP process to move disconnects to 11:59 pm of day after the scheduled port activation date and instructed Qwest to modify its SGAT accordingly.¹⁸⁶ The NMPRC noted that Qwest’s solution was untested at the time the *Group 2 Order* was being rendered. Therefore, the NMPRC’s recommendation of compliance with checklist item

¹⁸² Qwest Application, NM App. C, Vol. 1, Tab 5, at 76-81.

¹⁸³ 47 U.S.C. § 271(c)(2)(B)(vi).

¹⁸⁴ Remaining at issue was an issue that did not relate to New Mexico (the record revealed that perhaps only certain wire centers in the Salt Lake City, Utah metropolitan area might be implicated in Qwest’s 14-state region), *i.e.*, whether Qwest may restrict CLECs from access to unbundled switching in Density Zone 1 wire centers in the top 50 Metropolitan Service Areas (MSAs) when EELs are not available. *Group 4 Order* (Qwest Application, NM App. C, Vol. 1, Tab 5), at 78-80. For the record, the NMPRC offered its opinion that Qwest should not enjoy the exemption from the requirement relating to unbundled switching in Density Zone 1 unless a CLEC can obtain an EEL from Qwest as a local transport alternative on a basis at parity with Qwest’s self-provisioned local transport alternatives. *Id.* at 79-80.

¹⁸⁵ Qwest Application, NM App. C, Vol. 1, Tab 3, at 45-51.

¹⁸⁶ *Id.* at 50.

11 hinged on the following conditions being satisfied: (i) a review, as part of the NMPRC's consideration of the ROC OSS testing results, of the effectiveness of Qwest's next-day-disconnect solution; (ii) Qwest continuing its commitment to further investigation, in consultation with interested CLECs, of cost-effective means for automated coordination; and (iii) the NMPRC's determination, as a component of its consideration of the ROC OSS testing results, regarding whether Qwest's LNP performance is satisfactory and provided at parity by reviewing the New Mexico results of Qwest's audited performance measures for the most recent six-month period available at the time of the NMPRC's consideration of this issue.

Having reviewed the ROC OSS testing results in its *OSS Order*¹⁸⁷ and the Commission's findings and conclusions respecting this matter,¹⁸⁸ as well as Qwest's commercial performance for New Mexico,¹⁸⁹ the NMPRC believes Qwest has met the requirements of checklist item 11 as it pertains to New Mexico.

H. Checklist Item No. 13 – Reciprocal Compensation

In its *Group 2 Order*,¹⁹⁰ the NMPRC addressed Qwest's duty, pursuant to section 271(c)(2)(B)(xiii) of the Act, to include in its access and interconnection agreements reciprocal compensation arrangements that are consistent with the requirements of section 252(d)(2) of the Act. When Qwest's compliance with checklist item 13 was considered by the NMPRC, three issues remained at impasse: (i) excluding ISP-bound traffic from reciprocal compensation, (ii) the commingling of InterLATA and Local Traffic on the same trunk groups, and (iii) definition of tandem switching for purposes of reciprocal compensation.

¹⁸⁷ Qwest Application, NM App. C, Vol. 1, Tab 18.

¹⁸⁸ *Qwest 271 Order*, ¶¶ 381-385.

¹⁸⁹ *See, e.g.*, Qwest's Brief, at 97-98.

¹⁹⁰ *Group 2 Order* (Qwest Application, NM App. C, Vol. 1, Tab 3), at 51-63.

With respect to the first issue, the NMPRC noted the Facilitator had found in his *Group 2 Report*¹⁹¹ that subsequent to the filing of briefs in the Multi-State Proceeding, the Commission released the *ISP Remand Order*.¹⁹² Given the *ISP Remand Order*'s assertion of exclusive federal jurisdiction over and consequent exclusion of ISP-bound traffic from the reciprocal compensation requirements of section 251(b)(5) of the Act, the Facilitator recommended that treatment of ISP-bound traffic as a condition for compliance with checklist item 13 was inappropriate. The Facilitator noted, however, that his conclusion did not end the matter because the *ISP Remand Order*'s cost recovery scheme affects various sections of Qwest's SGAT. The Facilitator therefore requested that the parties provide, as part of their post-*Group 2 Report* 10-day comments, proposals for revising the sections of the SGAT affected by the *ISP Remand Order*.

Given that only one party, Qwest, filed responsive 10-day comments and given the significant jurisdictional and comity issues raised on the appeal of the *ISP Remand Order* to the District of Columbia Circuit by, among others, the National Association of Regulatory Utility Commissioners ("NARUC"), the NMPRC took the matter of intercarrier compensation for ISP-bound traffic under advisement and requested briefing on both the Facilitator's request for comments and the SGAT proposal contained in Qwest's 10-day comments.¹⁹³

In response to the NMPRC's request, several parties filed comments that included proposed remedial SGAT language. For its part, Qwest moved for partial rehearing of the *Group 2 Order*. One of the issues for which Qwest sought rehearing was the *Group 2 Order*'s requirement that Qwest remove its proposed § 7.3.6 from the SGAT pending the NMPRC's resolution of this

¹⁹¹ Qwest Application, Facilitator App. C, Vol. 1, Tab 2.

¹⁹² *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 & 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (released April 27, 2001) (*ISP Remand Order*).

matter.¹⁹⁴ In its *Group 2 Rehearing Order*, the NMPRC denied Qwest’s motion for rehearing insofar as it related to this matter, noting none of the SGAT language Qwest insisted should not be removed from the SGAT “can be regarded as being part of Qwest’s *approved* New Mexico SGAT unless and until any such language has been considered and accepted by order of the Commission.”¹⁹⁵ The NMPRC noted, moreover, that consistent with the discrete process established in the *Group 2 Order*, the NMPRC would resolve the issue regarding appropriate SGAT language in a subsequent order.¹⁹⁶

On May 3, 2002, the D.C. Circuit rendered its decision concerning the *ISP Remand Order*. The court found that the “transitional device” embodied in section 251(g) of the Act¹⁹⁷ did not provide a reasonable basis for the FCC’s exclusion of ISP-bound traffic from section 251(b)(5).¹⁹⁸ Since section 251(g) was the FCC’s sole justification for excluding ISP-bound traffic from reciprocal compensation, the D.C. Circuit remanded the matter to the Commission for further proceedings.¹⁹⁹ However, the court did no more than remand the issue of intercarrier compensation for ISP-bound traffic to the FCC because its rationale was not supportable. In addition to not deciding several important and, perhaps, decisive issues,²⁰⁰ the court declined to vacate the *ISP*

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¹⁹³ *Group 2 Order* (Qwest Application, Facilitator App. C, Vol. 1, Tab 2), at 58.

¹⁹⁴ *Id.*

¹⁹⁵ Qwest Application, NM App. C, Vol. 1, Tab 7, at 2 (emphasis in original).

¹⁹⁶ *Id.*

¹⁹⁷ 47 U.S.C. § 251(g). The D.C. Circuit interpreted section 251(g) as preserving certain pre-Act obligations imposed on LECs until such obligations have been explicitly superseded by FCC rules implementing the Act. *WorldCom v. FCC*, 288 F.3d 429, 432-33 (D.C. Cir. 2002).

¹⁹⁸ *Id.* 288 F.3d at 432-33.

¹⁹⁹ *Id.* 288 F.3d at 434.

²⁰⁰ *Id.* 288 F.3d at 433-34 (such as “whether handling calls to ISPs constitutes ‘telephone exchange service’ or ‘exchange access’ (as those terms are defined in the Act, 47 U.S.C. §§ 153(16), 153(47)) or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the ‘telecommunications’ covered by § 251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5); see § 252(d)(B)(i) (referring to bill-and-keep). Indeed these are only samples of the issues we

Remand Order. In this regard, the D.C. Circuit pointedly noted that that “[m]any of the petitioners themselves favor bill-and-keep and there is plainly a non-trivial likelihood that the FCC has the authority to elect such a system (perhaps under §§ 251(b)(5) and 252(d)(B)(i)).”²⁰¹

Therefore, inasmuch as the *ISP Remand Order*’s cost recovery system for ISP-bound traffic remained effective, the NMPRC deemed it necessary and appropriate to incorporate the Commission’s current cost recovery system into the SGAT. Accordingly, having compared various different language submissions on this issue, the NMPRC directed Qwest to modify its SGAT to incorporate verbatim the AT&T-Qwest consensus language on this issue approved by the Montana Public Service Commission.²⁰²

The second checklist item 13 issue at impasse, involving the commingling special access and local traffic, was the subject of even more protracted litigation before the NMPRC. In the *Group 2 Rehearing Order*, the NMPRC determined that the description of entrance facilities, a checklist item 1 issue the NMPRC had previously found the Facilitator left partially unresolved.²⁰³ Having resolved the technical description of entrance facilities, *i.e.*, that Qwest had agreed in subsequent proceedings before other state commissions that its SGAT should provide for interconnection using entrance facilities at any technically feasible POI chosen by the CLEC,²⁰⁴ the NMPRC proceeded to reconsider the related checklist item 13 issue of what CLECs should pay for interconnection at facilities that can also be used for exchange access.

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do not decide, which are in fact all issues other than whether § 251(g) provided the authority claimed by the Commission for not applying § 251(b)(5)”).

²⁰¹ *Id.* 288 F.3d at 434.

²⁰² *See Order Regarding Intercarrier Compensation for ISP-Bound Traffic* (Qwest Application, NM App. K, Vol. 1, Tab 1202), at 8.

²⁰³ *See supra* section IV.B; *Group2 Rehearing Order* (Qwest Application, NM App. C, Vol. 1, Tab 7), at 7-8.

²⁰⁴ *Id.* at 9.

The NMPRC's initial decision in the *Group 2 Order* required the pricing for interconnection of spare special access circuit capacity – essentially spare DS1 circuits on DS3 facilities – at the federally-tariffed special access rates;²⁰⁵ this initial take was driven in large measure by the Commission's policy against permitting interexchange carriers the ability to engage in what amounts to a regulatory arbitrage between special access facilities and combinations of UNEs, a practice that, if left unchecked, the Commission has found "would threaten an important source of funding for Federal universal service" and "would amount to a 'roundabout termination' of the access charge regime."²⁰⁶

However, on rehearing, the NMPRC was persuaded that the orders addressing the Commission's policy concerns regarding interexchange carriers' conversion of tariffed special access circuits to combinations of unbundled loops and transport network elements did not prohibit the pricing at TELRIC of spare special access capacity used *exclusively* for interconnection purposes.²⁰⁷ Therefore, given the apparent limitation of the FCC policy expressed most recently in the *Supplemental Order Clarification* to prohibiting the conversion of special access circuits to combinations of unbundled loops and transport network elements (or EELs), the NMPRC decided that the similarly important policy of promoting competition in the local exchange market warranted the institution of a proportional pricing system for commingled entrance facility traffic that comported with the uncontested technical description of entrance facilities. The NMPRC

²⁰⁵ Qwest Application, NM App. C, Vol. 1, Tab 3, at 59-63.

²⁰⁶ *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587, 9591-92, ¶ 7 (2000) (*Supplemental Order Clarification*). See *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, Supplemental Order, 15 FCC Rcd 1761, FCC 99-370, at 7 (1999) (*Supplemental Order*).

²⁰⁷ Qwest Application, NM App. C, Vol. 1, Tab 7, at 11-13.

consequently ordered Qwest to submit in our Cost Docket a proposal for a proportional pricing system.²⁰⁸

Qwest took exception to the NMPRC's decision on rehearing, arguing among other things that the proportional pricing system proposed by AT&T ran afoul of the prohibition against conversion of special access circuits to UNEs as established by the *Supplemental Order Clarification's* third local usage option ("Option 3").²⁰⁹ Qwest's argument was buttressed by a recent Commission decision, *Net2000 Communications*,²¹⁰ which was brought to the NMPRC's attention by Qwest in its motion challenging the NMPRC's decision in the *Group 2 Rehearing Order*. Having considered the parties' respective arguments, the NMPRC determined that its final decision on this issue would turn on whether the Commission's gloss on the *Supplemental Order* and *Supplemental Order Clarification* in *Net2000 Communications*, coupled with the NMPRC's experience in pricing interconnection facilities and UNEs, warranted its reassessment of the proportional pricing requirement for entrance facilities.

The NMPRC ultimately decided that the proportional pricing system requirement contained in the *Group 2 Rehearing Order* should be rescinded, first because given the Commission's pertinent policy statements in *Net2000 Communications*, the NMPRC was concerned that in seeking to promote the policy of fostering local competition through the proportional pricing of entrance facilities, the NMPRC inadvertently could trigger an insupportable tension with the Commission's policy against bypassing special access services through TELRIC pricing of mixed-use DS3 facilities, a policy that serves the critical purpose of preserving the universal service revenue

²⁰⁸ *Id.* at 14.

²⁰⁹ 15 FCC Rcd at 9599-9600, ¶ 22(3).

²¹⁰ *Net2000 Communications, Inc. v. Verizon – Washington, D.C., Verizon – Maryland, Inc., and Verizon – Virginia, Inc.*, FCC 01-381, 17 FCC Rcd 1150 (rel. Jan. 9, 2002).

stream.²¹¹ Moreover, the NMPRC found that its experience with the pricing of interconnection facilities and UNEs under the TELRIC methodology indicated that interconnection facilities often are priced at TELRIC levels, the same pricing principle that determines UNE prices.²¹² Therefore,

²¹¹ *Order on Rehearing Concerning Proportional Pricing System for Entrance Facilities* (May 7, 2002) (Qwest Application, NM Vol. K, Vol. 1, Tab 1178), at 5-6.

²¹² *See, e.g., Local Competition First Report and Order*, 11 FCC Rcd at 15816, 15844, 15847-48, 16023-24, ¶¶ 628, 672, 682, 1054-55.

the NMPRC concluded that it necessarily follows that the differentiation between interconnection and UNEs is a distinction without a difference, at least insofar as the policy considerations driving the *Supplemental Order* and *Supplemental Order Clarification* are concerned.²¹³ As a consequence, given the manner in which interconnection facilities tend to be priced under the TELRIC methodology, the NMPRC found that the concerns about regulatory arbitrage between special access and UNEs must apply equally to interconnection facilities.²¹⁴

Finally, regarding the third issue at impasse, the NMPRC found to be well taken e.spire's position that the Facilitator had added a "functional requirement" to the definition of tandem switch that is at odds with the Commission's rules, which do not require functional equivalency. Therefore, the NMPRC determined the tandem switching definition for reciprocal compensation purposes should be changed to accurately reflect 47 C.F.R. § 51.711(a)(3), which provides a CLEC should receive the incumbent LEC's tandem interconnection rate if the CLEC's switch serves a geographic area comparable to the area served by the incumbent LEC tandem switch.²¹⁵

Accordingly, given that all outstanding issues have been addressed to the NMPRC's satisfaction with respect to checklist item 13, the NMPRC recommends that Qwest be found to be in compliance with section 271(c)(2)(B)(xiii) of the Act.

I. Checklist Item No. 14 – Resale

The NMPRC addressed in its *Group 2 Order*²¹⁶ Qwest's obligation pursuant to section 271(c)(2)(B)(xiv) of the Act to make "telecommunications services...available for resale in

²¹³ Qwest Application, NM Vol. K, Vol. 1, Tab 1178, at 6.

²¹⁴ *Id.*

²¹⁵ *Group 2 Rehearing Order* (Qwest Application, NM App. C, Vol. 1, Tab 7), at 15.

²¹⁶ Qwest Application, NM App. C, Vol. 1, Tab 3, at 63-66.

accordance with the requirements of sections 251(c)(4) and 252(d)(3).”²¹⁷ The Facilitator reported that thirty-two checklist item 14 issues were raised and resolved by the participants in Workshop One. Eleven issues remained at impasse. Qwest agreed not to challenge any aspect of the Facilitator’s decisions regarding the disputed issues. In addition, Qwest agreed to make the SGAT changes required by the Facilitator. Similarly, neither AT&T nor Staff challenged any of the disputed resale issues. The NMPRC therefore approved the Facilitator’s recommendations regarding all thirty-two resale issues. The NMPRC thus concluded that Qwest was in provisional compliance with checklist item 14.²¹⁸ Having met the remaining requirements in terms of OSS provisioning and SGAT compliance, the NMPRC recommends that the Commission find Qwest has satisfied the requirements of checklist item 14, consistent with the Commission’s recent conclusion with respect to Qwest’s nine-state application.²¹⁹

V. SECTION 272

In an order entered February 12, 2002, the NMPRC recommended that the Commission find that Qwest has satisfied the requirements of section 272 of the Act.²²⁰ On May 21, 2002, the NMPRC entered an order denying AT&T’s motion for rehearing, a motion that had requested that the NMPRC condition its conclusion that Qwest was in compliance with section 272 unless and until Qwest demonstrated it was actually providing exchange access services to competitors at parity with the exchange access services that Qwest provides to itself (as an intraLATA toll provider) and its then-section 272 affiliate, Qwest Communications Corporation (“QCC”), pursuant to section 272(e)(1).

²¹⁷ 47 U.S.C. § 271(c)(2)(B)(xiv).

²¹⁸ *Id.* at 66.

²¹⁹ *Qwest 271 Order*, ¶ 386.

²²⁰ *Order Regarding Section 272 Compliance* (Qwest Application, Vol. 1, Tab 8).

The NMPRC regarded this matter to be closed until Qwest withdrew its first two pending section 271 applications on September 10, 2002, purportedly for the sole reason that it could no longer certify that QCC's books, records and accounts had been maintained in accordance with Generally Accepted Accounting Principles ("GAAP") as required pursuant to section 272(b)(2) of the Act. The NMPRC found that Qwest's disclosure rendered inaccurate the NMPRC's prior findings and conclusions respecting compliance with section 272, especially sections 272(b)(2) and (b)(5) to which Qwest expressly alluded in its September 10 disclosure to the NMPRC. Accordingly, the NMPRC decided it could no longer determine whether Qwest actually was in compliance with the requirements of section 272, effectively rescinding its earlier recommendation of compliance with the requirements of section 272.²²¹

On September 27, 2002, AT&T filed a motion to reopen the NMPRC's section 272 proceedings for the purposes of holding evidentiary hearings to ascertain whether Qwest and its new section 272 affiliate, QLDC, satisfy the requirements of section 272. Denying the motion to reopen, the NMPRC found that the Commission's observation that state commissions need not conduct further evidentiary proceedings in instances where BOC applications are withdrawn and quickly refiled applied with particular force to the region-wide issue that compliance with section 272 presents. In this regard, the NMPRC noted the Commission gave state commissions in Qwest's region no indication that it anticipated any additional state review of Qwest's demonstration of compliance with the requirements of section 272. On the contrary, the NMPRC found it would waste administrative resources for it to conduct an isolated review of an indisputably region-wide

²²¹ *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 85 & n.264.

issue that eventually would be addressed by the Commission, as it was in the context of the Commission's assessment of Qwest's nine-state application.²²²

VI. THE PUBLIC INTEREST TEST

The NMPRC addressed the public interest requirement set forth in section 271(d)(3)(C) of the Act in its *Final Order*. The protracted procedural history and the NMPRC's detailed findings and conclusions regarding the numerous issues raised by the parties in the Multi-State Proceedings or separately before the NMPRC are set forth in the *Final Order*.²²³ Having reviewed the Commission's *Qwest 271 Order*,²²⁴ the NMPRC reports to the Commission that its stands squarely behind its recommendation that the Commission find that the local exchange market in Qwest's New Mexico territory is open to competition and there are no unusual circumstances that would make long distance entry contrary to the public interest under the particular circumstances of Qwest's section 271 application for New Mexico.

Nonetheless, given the seeming conflict between the Track A *de minimis* standard and the public interest test as it pertains to New Mexico, the NMPRC offers the following limited comments. In the public interest proceedings before the NMPRC, several of the parties argued that it would not be in the public interest to authorize Qwest's entry into the in-region, interLATA market in New Mexico given the lack of local competition demonstrated in this market, particularly for residential subscribers. This point was raised in the context of their argument that the Facilitator improperly shifted the burden of proof onto the intervenors to prove Qwest's entry into the long distance market

²²² See *id.* at 87-89. See generally *Qwest 271 Order*, ¶¶ 393-418.

²²³ See generally *Final Order* (Qwest Application, NM App. C, Vol. 1, Tab 19), at 67-146. The issues included (i) assurance of future compliance; (ii) local service freeze; (iii) misapplication of the burden of proof relative to a showing of a lack of local competition in New Mexico; (iv) intrastate access price squeeze; (v) prior Qwest conduct; (vi) the Act's UNE pricing requirements (objection to benchmarking analysis); (vii) advanced services; (viii) UNE price squeeze; (ix) NMPRC findings and conclusions regarding its unfiled interconnection agreements investigation in Utility Case No. 3750.

would *not* be in the public interest. The argument was supported by the fact that the Facilitator apparently misread, albeit harmlessly as the NMPRC ultimately concluded,²²⁵ the governing standards, as evidenced by the following quote from the *Public Interest Report*:

We must be careful not to confuse the issue of whether the door to the ‘room’ where CLECs will compete is open with the issue of whether it is occupied by them. The *Track A and B* construct established by the Congress clearly implies that the more precisely defined requirements of section 271 can be met *in an empty room*, provided we are certain the door has been unlocked.”²²⁶

As the NMPRC noted in addressing this issue in its *Final Order*, while the construct described by the Facilitator may well apply to Track B applications, the NMPRC’s textual reading of section 271(c)(1)(A) indicates the construct is not applicable to Track A applications, such as the instant Qwest application, which must satisfy the dispositive requirement that there be facilities-based competitors serving more than at least a *de minimis* number of residential and business customers in New Mexico. Otherwise, as the NMPRC observed in its *Final Order*, Track A would be rendered a nullity, a result which, at the very least,²²⁷ would not comport with the canon of statutory construction that statutes must be read to give effect to every provision.²²⁸

In contrast with Track A, the public interest test does not mandate any particular level of competition. The NMPRC understands and recognizes that the Commission has consistently

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²²⁴ See generally *Qwest 271 Order*, ¶¶ 419-507.

²²⁵ *Final Report* (Qwest Application, NM App. C, Vol. 1 Tab 19), at 77-78.

²²⁶ Qwest Application, Facilitator App. C, Vol. 1, Tab 9, at 8 (emphasis added).

²²⁷ Such as, for instance, the fact that the protracted proceedings specifically devoted to the purpose of demonstrating the satisfaction of the *de minimis* standard as it pertains to the residential market in New Mexico would amount to a profound and unnecessary waste of the NMPRC’s as well as Staff’s and the intervenors’ time and resources.

²²⁸ See, e.g., *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (it is an “‘elementary canon of construction that a statute should be interpreted so as not to render one part *inoperative*’”) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)) (emphasis added).

rejected the suggestion that a record revealing low levels of residential competition, without more, is not a sufficient basis to deny a section 271 application on public interest grounds. For instance, in the *Verizon Massachusetts Order*, the FCC held that:

Given an affirmative showing that a market is open and the competitive checklist has been satisfied, low customer volumes in and of themselves do not undermine that showing. Factors beyond a BOC's control, such as individual competitive LEC entry strategies, might explain a low residential customer base. We note that Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we have no intention of establishing one here.²²⁹

Thus, while the public interest standard does not require any particular market share that a competitor or competitors should possess for a BOC to be granted entry into the long distance market, the Commission has made it equally clear there might be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a competing provider.²³⁰

Accordingly, insofar as the public interest component of the section 271 analysis is concerned, the NMPRC recommends that the Commission find that Qwest's section 271 application for authority to provide in-region, interLATA service in New Mexico is in the public interest and that the Commission grant Qwest such authority, assuming the Commission finds Qwest has satisfied all of the other dispositive requirements, the most prominent of which given the novel

²²⁹ *Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, 16 FCC Rcd 8988, ¶ 235 (rel. Apr. 16, 2001).

²³⁰ *Ameritech Michigan Order*, ¶ 77. This principle persists in the Commission's more recent section 271 Orders. See, e.g., *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Vermont*, CC Docket No. 02-7, Memorandum Opinion and Order, 17 FCC Rcd 7625, ¶ 12 (rel. Apr. 17, 2002) ("*Verizon Vermont Order*") ("Congress specifically declined to adopt a volume requirement, market share, or other similar test for BOC entry into long distance,

circumstances of Qwest's application for New Mexico is satisfaction of the requirements of Track A.

VII. SGAT COMPLIANCE WITH THE NMPRC'S ORDERS

The NMPRC found and concluded in its *Final Order* that Qwest's 10th Revised SGAT was in substantial compliance with the interim orders summarized above and specified additional modifications to Qwest's SGAT that would put Qwest's SGAT in full compliance with the NMPRC's section 271-related orders. The procedural history and the findings and conclusions regarding the SGAT are set forth in the NMPRC's *Final Order*, at 5-34.

Although the NMPRC extended to parties the invitation to file comments with respect to the 11th Revised SGAT that the NMPRC ordered Qwest to file in conformity with the requirements of the *Final Order*, no party took issue with the 11th Revised SGAT's compliance with the NMPRC's section 271-related orders. Therefore, the NMPRC permitted Qwest's 11th Revised SGAT to take effect on December 10, 2002 by operation of 47 U.S.C. § 252(f)(3)(B), subject to the NMPRC's continuing review of Qwest's SGAT pursuant to 47 U.S.C. § 252(f)(4).

VIII. CONCLUSION

For the reasons set forth above, and pursuant to its authority under section 271(d)(2)(B) of the Act, the New Mexico Public Regulation Commission recommends that, assuming the Commission determines Qwest has satisfied the requirements of section 271(c)(1)(A) of the Act, the Commission should approve Qwest's application for authority to enter the in-region, interLATA market in the State of New Mexico.

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and, as stated above, we find that each of the carriers described above is actively providing facilities-based service to more than a *de minimis* number of customers").

Respectfully submitted,

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ON BEHALF OF THE NEW MEXICO
PUBLIC REGULATION COMMISSION

Dated: February 5, 2003.